Religion in Public School Classrooms, Hallways, Schoolyards and Websites: From 1967 to 2017 and Beyond

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Presented at the 2017 School Law Seminar, March 23-25, Denver, Colorado

The NSBA Council of School Attorneys is grateful for the written contributions of its members. Because Seminar papers are published without substantive review, they are not official statements of NSBA/COSA, and NSBA/COSA is not responsible for their accuracy. Opinions or positions expressed in Seminar papers are those of the author and should not be considered legal advice.

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"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." United States Constitution, First Amendment

I. PAROCHELIAID CASES

A. Aid to Parochial Schools (Overview)

A pressing concern is the extent of aid a school district can provide to parochial school students. The United States Supreme Court first addressed this issue in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), where it held that a state statute which authorized reimbursement of transportation expenses to parents of children attending parochial schools did not violate the Establishment Clause of the Constitution. The Court reasoned that although it is constitutionally permissible to provide government benefits directly to students and/or their parents, the Establishment Clause prohibits the direct grant of government benefits to a parochial school. This rationale was followed by the Supreme Court in subsequent decisions which further defined the scope of permissible state aid to parochial schools.1

1 See *Board of Education of Central School District v. Allen*, 392 U.S. 236 (1968) (New York law requiring public schools to lend textbooks to parochial school students free of charge does not violate the Establishment Clause); *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664 (1970) (statute exempting from taxation property owned by religious organizations does not violate the First Amendment when its intent stops short of establishing, sponsoring, or supporting religion); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (Rhode Island statute providing salary supplements to teachers in religious schools for secular subjects and reimbursements to such schools for salaries and instructional materials for such subjects was ruled unconstitutional; Pennsylvanian program to reimburse nonpublic schools for teachers' salaries, textbooks, and instructional material; and the relationship with the state with the school in auditing financial records was deemed unconstitutional); *Levitt v. Committee for Public Education and Religious Liberty (PEARL)*, 413 U.S. 472 (1973) (state statute permitting reimbursement to religious schools for expenses related to the administration, grading, compiling and reporting of certain tests held to violate the Establishment Clause); *Meek v. Pittenger*, 421 U.S. 349 (1975) (the direct loan of instructional materials and equipment to religious schools and the provision of auxiliary services such as counseling, testing, psychological services, speech and hearing therapy, teaching and related services for exceptional children to students enrolled in religious schools violated the Establishment Clause; lending textbooks without charge to children attending religious schools is constitutional); *Wolman v. Walter*, 433 U.S. 229 (1977) (statute authorizing the loan of secular textbooks to students, supplying standardized tests and scoring services, supplying speech and hearing diagnostic services in the religious schools, supplying therapeutic services at a neutral site is constitutional; Court further held that the provision of instructional materials and equipment as well as providing unrestricted transportation and services for field trips is unconstitutional); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania statute providing for reimbursement of tuition paid by parents of students in religious schools held to violate the Establishment Clause because it had the primary effect of advancing religion); *Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota statute allowing for educational expenses incurred by parents of elementary and secondary students, including those in religious schools, does not violate the First Amendment); *Aguilar v. Felton*, 473 U.S. 402 (1985) (a New York City Board of Education program which used federal funds received under Title I of the Elementary and Secondary Education Act of 1965 to pay salaries of public school employees to teach in parochial schools in New York City violated the Establishment Clause since the scope and duration of the program would require permanent and pervasive state presence in sectarian schools receiving aid by requiring the City Board to adopt a system for monitoring religious content of publicly funded Title I classes); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (a school district's shared time and community education programs, which provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools had the "primary or principal" effect of advancing religion and therefore violated the dictates of the Establishment Clause of the First Amendment); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (the creation of a separate public school district to provide residents of a municipality comprised of a single religious group with special education...

Under an agreement between a local school district in Louisiana and the New Orleans Catholic archdiocese, the school district loaned Catholic schools operated by the archdiocese secular, nonreligious materials, such as books, computer hardware, and software packages. Taxpayers challenged the school district’s use of the federal funds on grounds that providing the educational materials to nonsecular private schools violated the Establishment Clause. The Supreme Court in a six to three decision held the school district’s loan of federally funded educational materials to Catholic schools did not violate the Establishment Clause of the First Amendment.

Justice Thomas framed the issue as whether governmental aid to religious schools that results in religious indoctrination can be reasonably attributed to governmental action. Noting that the principles of neutrality and private choice were crucial to the Court’s analysis not only in *Agostini* but also in prior Supreme Court cases (*Zobrest, Witters, and Mueller*), Justice Thomas stated that the presence of private choice ensures neutrality by eliminating the possibility of attributing religious indoctrination to the state.

**B. Scholarships and Vouchers**


In a five-to-four emotionally charged decision, the United States Supreme Court ruled constitutional Cleveland’s school voucher program. In so ruling, the nation’s high court effectivelly gave a green light for similar voucher programs across the nation. In most cases however, legislation and/or state constitutional change may first have to be attained in order for states to adopt such voucher programs.

Chief Justice Rehnquist, writing for the majority, concluded that Cleveland’s voucher plan was a program of “true private choice” and as such was not a governmental program supporting religion. The contested program provided vouchers directly to income-eligible parents of elementary school students to attend “participating” schools servicing the Cleveland school district, which had previously been taken over by the State pursuant to a federal district court order. The parents, in turn, endorsed their voucher checks over to participating schools. Both public and private schools were eligible to participate. Private schools wishing to participate had to be within the geographic boundaries of the Cleveland school district and had to be registered with the state. Only public schools adjacent to the Cleveland school district were eligible to participate. Up to the time when the litigation was commenced, no public schools had registered to do so. Of the private schools registered to participate, 82% were church-affiliated, and 96% of the students participating in the voucher program were enrolled in sectarian schools. The Sixth Circuit Court of Appeals had previously ruled that the Cleveland private school voucher program violated the Establishment Clause because the program provided direct financial aid to religious schools. The appeals court had based its decision upon a finding that the program’s neutrality was illusory and that while both public and private schools could participate, there was a financial

and related services in an exclusive religious environment violated the Establishment Clause; five members of Court indicated a willingness to revisit *Aguilar* with the possibility of reversal because *Aguilar* prohibited parochial school students from being taught by public school teachers and as a result thereof, New York State acted to confer an unconstitutional benefit upon a religious community; *Agostini v. Felton*, 521 U.S. 203 (1997) (sending public employees into parochial schools to provide Title I services, including remedial instruction and counseling, does not violate the Establishment Clause of the First Amendment to the United States Constitution. While the Court's decision does not require the provision of Title I services on the premises of parochial schools, it permits such a practice. In so holding, the Court reversed its ruling in *Aguilar v. Felton*, 473 U.S. 402 (1985) and a portion of its ruling in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The U.S. Department of Education has issued guidance for school districts that decide to provide such services on the premises of parochial schools.)
disincentive for public schools to do so. The per pupil expenditure in neighboring public schools that accepted students from the Cleveland district was limited to $2,250 from the voucher program, some five thousand dollars less than the state aid for resident students.

On appeal, the Supreme Court reversed, holding that the program did not offend the Establishment Clause because the program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. The majority stated:

the Court’s jurisprudence makes clear that a government aid program is not readily subject to challenge under the Establishment Clause if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choices. Under such a program, government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients not the government, whose role ends with the disbursement of benefits.

The majority found that no reasonable observer would think that such a neutral private choice program carries with it the imprimatur of government endorsement. Nor did the Court find evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options. The Establishment Clause question of whether the voucher program coerced parents to send their children to religious schools must be answered by evaluating all options Ohio provides its schoolchildren, only one of which is to obtain a scholarship and then choose a religious school.

The Court found that Cleveland's preponderance of religiously affiliated schools did not result from the program, but was a phenomenon common to many American cities. Eighty-two percent of Cleveland's private schools at that time were religious, as were 81% of Ohio's private schools. “To attribute constitutional significance to the 82% figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed. Likewise, an identical private choice program might be constitutional only in States with a lower percentage of religious private schools. The Court also rejected the taxpayers' additional argument that constitutional significance should be attached to the fact that 96% of the scholarship recipients were enrolled in religious schools. “The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school.” Joining the Chief Justice were Justices O'Connor, Scalia, Kennedy and Thomas.

Justices Souter, Stevens, Breyer and Ginsburg dissented. To the dissenters, the $2,250 cap on tuition gave an illusion of choice that in fact steered children toward the religious schools, where tuition is below that limit, and away from secular private schools, where tuition is above it. Despite the fact that the majority of the Supreme Court saw this decision as the logical, if not inevitable, extension of a series of rulings dating back to an opinion from 1983 ruling on constitutional legislation in Minnesota permitting tuition tax credits to parents, including those who sent their children to parochial schools, the dissenters saw this ruling as a sharp break from the past. To Justice Breyer, this voucher program differed “in both kind and degree from aid programs upheld in the past” because they provided public money “to a core function of the church: the teaching of religious truths to young children.” Justice Breyer also predicted that this decision would prove highly divisive as the nation reacts to governmental funding for schools.
which take controversial religious positions on topics of current popular interest such as the war on terrorism. To this the majority saw the only divisiveness as being possible future litigation.

To Justice Stevens, “whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of democracy.” Finally, Justice Souter recognized that the Court’s majority dramatically changed the landscape of American church and state jurisprudence. “Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools.” Although the effects of the Court’s decision upon public education may indeed be profound, such effects will not be manifested until and unless such time as other states, including New York, adopt legislation authorizing such programs.


In this case, the United States Supreme Court, in a 7-2 decision upheld a Washington State law which specifically prohibits state scholarship funds from being used to pursue a degree in theology. In upholding the state’s very specific prohibition of funding a degree in theology, the Court chose not to answer the question of whether that state’s broader constitutional prohibition of funding any institution under the direct control of a religious denomination was constitutional. Currently, about 36 states have these broad constitutional provisions, known as “Blaine Amendments,” which erect a higher wall separating church and state than is required by the federal Constitution.

In this case, a student was awarded a state scholarship but, pursuant to state law and state constitutional provisions, was precluded from utilizing it to pursue a degree in theology. A lower federal court ruled against the student, but a federal appeals court reversed, concluding that the state had singled out religion for unfavorable treatment in violation of the First Amendment’s freedom of religion clause. Upon an appeal to the nation’s highest court, Chief Justice William Rehnquist upheld the state’s actions as constitutional. Dissenting opinions were filed by Justices Antonin Scalia and Clarence Thomas. Writing for the majority, Justice Rehnquist noted that there is indeed an inherent tension which exists in separating church and state but that there is “room for play in the joints” between them. Although the Court determined that the state, consistent with the First Amendment could have funded scholarships for individuals seeking degrees in theological studies, it was not required to do so. Washington State’s prohibition against such funding was not seen by the Court as an unconstitutional disfavoring of religion. Rather, the state had merely chosen not to fund a distinct category of instruction. The Court found that the state was free to draw a more stringent line than that drawn by the United States Constitution. In its decision, the Court noted the long history on the part of states in placing formal prohibitions in their state constitutions against using tax funds to support the ministry. These provisions were enacted to preclude the government from requiring state-support of religious authorities.


This tuition tax credit case concerned an Arizona law which granted income tax credits to taxpayers who made contributions to nonprofit organizations called “school tuition organizations” (STOs) that, in turn, awarded private school scholarships to children. The plaintiffs alleged that the majority of the organizations funded under this program restricted the availability of scholarships to religious schools, such that the program deprived the program’s aid recipients (parents of students eligible for scholarships) of a genuine choice between private secular schools or religious ones. Thus, the plaintiffs alleged, the statute violated the Establishment Clause as applied.
The U.S. Supreme Court, in a 5-4 vote, ruled that Arizona taxpayers, who were challenging the state’s tuition tax credit on Establishment Clause grounds, lacked standing to bring the suit under Article III of the U.S. Constitution. Specifically, the Court concluded that the taxpayers had not satisfied the two conditions laid out in *Flast v. Cohen*, 392 U. S. 83 (1968), in order to be excepted from the general rule that taxpayers lack standing to object to government expenditures alleged to be unconstitutional. Justice Kennedy, joined by Chief Justice Roberts, and Justices Scalia, Thomas and Alito, delivered the Court’s opinion. Justice Scalia, joined by Justice Thomas, filed a concurring opinion. Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, filed a dissenting opinion.

The Supreme Court examined whether the plaintiffs had standing despite “the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional.” It pointed out that the plaintiffs’ suit fell within the exception established in *Flast*, a narrow exception that requires the taxpayer to satisfy two conditions. First, there must be a “logical link” between the plaintiff’s taxpayer status and the type of legislative enactment attacked. Second, there must be “a nexus” between the plaintiff’s taxpayer status and “the precise nature of the constitutional infringement alleged.”

The majority rejected the taxpayers’ contention that for purposes of *Flast* the tax credit is "best understood as a governmental expenditure." It acknowledged “that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit.” The majority concluded, however, “tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities.” It stressed that under this program, Arizona taxpayers choose to contribute to STOs. They spend their own money, not money the state has collected from the plaintiffs or other taxpayers. “The STO tax credit is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast* [in which government funds were directly paid to religious schools],” and “[i]t follows that respondents have neither alleged an injury for standing purposes under general rules nor met the *Flast* exception.”

The majority also concluded that the taxpayers had failed to satisfy the requirements of causation and redressability. In regard to causation, it pointed out that contributions are made as result of decisions by private taxpayers concerning their own funds. The majority emphasized that “objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. . . . “These considerations prevent any injury the objectors may suffer from being fairly traceable to the government.”

The majority acknowledged that its conclusion that the *Flast* exception is inapplicable may appear at odds with several earlier cases, all addressing Establishment Clause issues and all decided after *Flast*. It disposed of the seeming contradiction, explaining that the standing issue could have been raised there, but “those cases do not mention standing and so are not contrary to the conclusion reached here.”


In 2015 the Nevada Legislature adopted an education savings account (ESA) program that allows students to obtain an account funded by tax dollars diverted from public education. In Nevada, the state provides over 60% of all K-12 education dollars. Each ESA would divert 90% of the average per pupil expenditure; disabled students or students from low income families would get 100% of the average per pupil expenditure. The Nevada Supreme Court upheld the voucher program, finding: “The program does not alter the existence or structure of the public school system so did not violate the constitutional requirement to provide for a ‘uniform system of common schools’.” As long as the Legislature maintains a uniform public school system, the Legislature could constitutionally encourage other suitable educational measures like the voucher program. There was no violation of the prohibition of using public funds for sectarian purposes,
because “[o]nce the public funds are deposited into an education savings account, the funds are no longer ‘public funds’ but are instead the private funds of the individual parent who established the account.”


A lawsuit brought in 2013 by Oklahoma taxpayers alleged that the statute providing a state funded scholarship to students with disabilities to attend a private school was unconstitutional. A state trial court ruled in favor of the plaintiffs, finding the voucher scheme violated the constitutional prohibition against spending public dollars for private purposes. On appeal by the state, the Oklahoma Supreme Court upheld the voucher program, finding: no violation of the state constitution’s “no aid” provision, because parents are free to choose sectarian or non-sectarian schools. Because money flows as a result of parental choice, there was no direct benefit to religion or religious schools. The state exerts no influence on choice of the parents, making the statute neutral on its face. Parental acceptance of voucher was a voluntary relinquishing of federal rights.

II. DEVOTIONAL ACTIVITIES IN PUBLIC SCHOOLS

A. Moment of Silence


   Alabama statute held unconstitutional which had authorized a one-minute period of silence in public schools for "meditation or voluntary prayer." State's legislative purpose was found to be solely an "effort to return voluntary prayer to the public schools."

   Note: Since *Jaffree*, four federal appellate courts have examined statutes enacting moments of silence for quiet contemplation or reflection (*See Croft v. Governor of Texas*, 562 F.3d 755 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997); *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), appeal dismissed for lack of jurisdiction, 484 U.S. 72 (1987)). In three cases (*Gilmore, Bown, and Croft*), the statutes were upheld, as there was no evidence showing intent to promote prayer.

B. Benedictions, Invocations and Student Led Prayer


   A New York statute calling for non-denominational prayer in public schools prepared by the New York State Board of Regents was held unconstitutional.


   Federal appellate court enjoined voluntary prayer at school assemblies.


   The U.S. Supreme Court addressed the issue of whether allowing members of the clergy to offer a prayer as part of a public school graduation ceremony violates the separation of church and state guaranteed by the U.S. Constitution. In a 5-4 decision written by Justice William Kennedy, who was joined by Justices Harry A. Blackmun, John Paul Stevens, Sandra Day O'Connor and David Souter, the Supreme Court held that the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the establishment clause that prohibits government from advancing religion and ruled unconstitutional the district's benediction.

The United States Court of Appeals for the Fifth Circuit ruled constitutional a school district resolution which permitted public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies. The Court ruled that the resolution did not have a religious purpose, a primary effect of advancing religion and would not excessively entangle the school district in matters of religion. The United States Supreme Court refused to hear the case.


The United States Supreme Court, in a 6-3 decision, struck down as unconstitutional a Texas school district policy permitting student-led prayer at football games. In its 1992 decision, Lee v. Weisman, the United States Supreme Court previously determined it to be unconstitutional for school districts to invite clergy members to provide invocations and benedictions at graduation ceremonies, ruling such practices to have the coercive effect of requiring students to support or participate in a religious exercise. Prior to Santa Fe, it was unclear as to whether it was constitutional for a district to have a policy permitting students to initiate their own invocations at school-sponsored events. The Court’s opinion does not specifically address the issue of whether student-initiated prayer at graduation ceremonies is constitutional as the factual context involves high school football games. However, it is widely believed that the Court’s reasoning in this decision will equally invalidate any school district policy which permits similar student initiated prayers at any future school sponsored events such as graduation ceremonies.

The Court’s decision in Santa Fe did not alter its previous ruling regarding the school board’s policy. The Court pointed out that “the total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker’s complete autonomy over the content of the message [means] that the message delivered be it secular, sectarian or both is not state sponsored.”


In Borden, the district’s football coach engaged in a twenty-year tradition of selecting a senior football player to read a prayer at team pasta dinners (where parents and other guests were also in attendance) and to lead the team in a prayer in the locker room before each game. He was directed by the school board to cease such activities and comply with newly adopted guidelines concerning faculty participation in student prayer. While the coach agreed to do so, and conducted himself in accordance with the guidelines, he initiated a lawsuit challenging the guidelines and continued to bow his head during student-led prayers at dinner and in the locker room.

The court considered, among other issues, whether the district had a right to adopt the guidelines out of concern that the coach’s actions in bowing his head during team prayers violated the Establishment Clause. It applied the “endorsement test” and inquired whether a reasonable observer familiar with the coach’s long-standing tradition of leading his team in prayer would perceive the coach’s action of bowing his head during student prayer as government endorsement of religion. The court determined that given the coach’s history of involvement in team prayer, a reasonable inference could be drawn that his current conduct is meant to “preserve a popular ‘state-sponsored religious practice’” of praying with his team before games. Thus, his actions constituted an unconstitutional endorsement of religion.

A family challenging a district’s prospective prayer-at-graduation policy was denied injunctive relief based upon the fact that they had moved out of the district by the time the Court heard the case. However, the Court ruled that the American Humanist Association’s claim could continue. In this case, the plaintiffs claimed that the school district unlawfully endorsed and promoted religion by its past practices of including school-sponsored prayer at graduation ceremonies and holding those events in Christian-based venues. The plaintiffs also challenged as unconstitutional the district’s current policies, which prohibit school-sponsored prayer but allow prayer initiated and led by students, and restrict the appearance of religious iconography when school events are held in religious venues. With respect to the school district’s past practices, the district court held that the past practice of school-sponsored prayer at graduation events was unconstitutional, and the school district did not challenge this holding on appeal. The district court failed to address the school district’s past use of religious venues for graduation ceremonies. With regard to the current policies, the district court held that the revised policy permitting student-initiated prayer at graduation events is constitutional, but declined on the ground of mootness to address the constitutionality of the revised policy concerning the use of religious venues. The federal appeals court ruled that both AHA and the family were entitled to have their claims against the prior policy of holding events in Christian-based venues remanded to the district court for consideration.

8. Additional guidance on “Constitutionally Protected Prayer in Public Elementary and Secondary Schools” is available from the U.S. Department of Education. Its purpose is to provide guidance to schools and the public concerning the current state of the law regarding prayer in the public schools, and the extent to which prayer in public schools is legally protected. The document was released in 2003 and has not been updated or changed. It is available at: [http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html](http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

9. **Prayer at School Board Meetings**


May school boards open their meetings with a prayer? Although not directly answering that specific question, the U. S. Supreme Court ruling in *Town of Greece, N.Y. v. Galloway* clears the way for local governmental bodies – including, presumably, school boards – to institute such a practice. Prior decisions from the Supreme Court recognized the authority of Congress and state legislatures to open meetings with overtly religious invocations.

The *Greece* case arose when two community members challenged the practice of the Town of Greece to invite local clergy to offer an opening prayer at its town board meetings. Anyone could request to give an invocation and the town never rejected such a request. Furthermore, the town did not review the prayers beforehand, and left it up to the “chaplain of the month” to determine the tone and content of the prayer. In practice, however, most of the prayers were delivered by invited Christian clergy members who used uniquely Christian language. The case was not about ending the practice, but rather about limiting the content of the prayers and eliminating social pressures on non-adherents to conform to the practice.

A 5-4 majority of the Supreme Court rejected the argument that the prayers should have been nonsectarian and included references only to a “generic God” or not be identifiable with any one religion. Writing for the majority, Justice Anthony Kennedy further cautioned against limiting the content of prayers to include only religious words acceptable to a majority because “government may not seek to define permissible categories of religious speech.”
Kennedy added that this does not mean there are “no constraints…on [the] content” of the prayers. The historical purpose of such prayers is to “lend gravity to the occasion” and “unite lawmakers in their common effort.” The opportunity may not be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.” The outcome of the case would have been different if there had been evidence of invocations that “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.”

The majority opinion acknowledged the growing pluralistic nature of today’s society. But that circumstance is best addressed by including representatives of many creeds rather than proscribing the content of prayers. In this case, there was no evidence of an aversion or bias against minority faiths. It just turned out that nearly all the congregations in the Town were Christian. Moreover, the town allowed prayers by any minister or layperson wishing to offer one.

Regarding the argument that the practice of allowing sectarian prayers placed pressure on non-adherents to conform, a majority of the Court found no evidence of impermissible coercion. The town board did not direct members of the public present at its meetings to participate or single out those who did not. Neither did the board indicate that decisions affecting those with business before it would be affected by their acquiescence in the prayer.

In a dissent, Justice Elena Kagan, joined by Justices Ruth Ginsburg, Stephen Breyer and Sonia Sotomayor, said the town’s actual practice did not ensure that “every citizen, irrespective of religion, owns an equal share in … government” participation.

School boards wishing to open their meetings with a prayer should consult with their school attorney about specific procedures for implementing such a practice to avoid potential pitfalls identified in Kennedy’s decision.


Parents of public school students sued the school district, challenging the constitutionality of the board’s policy of opening public meetings with prayer. The board policy provided that on a rotating basis one individual adult board member will be given the opportunity to offer a prayer or request a moment of silence. The meetings are routinely attended by students from the school district. The district submitted that a school board is like a legislative body and that its practice of opening board sessions with a prayer is akin to that which was upheld by the United States Supreme Court in Marsh v. Chambers, 463 U.S. 783 (1983). The court declined to extend Marsh to prayer at school board meetings because of the need to guard against potentially coercive atmosphere and the nature of the relationship between the school board and students and schools. The court concluded that the board’s prayer policy violated the Establishment Clause.

III. STUDENT RELIGIOUS SPEECH

A. Student Led Bible Study


The parents of a fourth grade student claimed that their son’s first amendment rights were violated by the school district because he got the impression that he could not participate in a student-led Bible study during recess. During the school year, the student began to meet with other students during recess to read and discuss the Bible. Another parent contacted the teacher and complained. The teacher instructed the leader of the group to not have the meeting that day as she wanted to refer the matter to the principal to determine whether the meetings were permissible. The principal determined that organized Bible study during recess was not permitted, and the students were informed of the same. The principal subsequently contended that she misunderstood the situation, believing that the students wanted a Bible study class, and
was not acting pursuant to a policy against Bible study during recess. The students continued to read and discuss the Bible at recess without any consequences. The case went to a jury that determined that the district had not violated the student’s constitutional rights and this was upheld on appeal.

According to the court, there “was ample evidence on the record that students were continuing to read and discuss the Bible during recess, and they were allowed to do so, which likely prompted the jury to find that Plaintiff’s constitutional rights had not been violated.” In a footnote, the circuit court of appeals noted that the district court determined that if the principal prevented student Bible study during recess, that action would constitute a deprivation of the student’s First Amendment rights. The court stated that while neither party disputed this finding, “the law of this Circuit does not necessarily support the conclusion that preventing an elementary-age student from organizing student Bible study would violate his or her First Amendment rights...In adjudicating the claims before us, we express no opinion as to the underlying constitutionality of a school’s restriction on elementary student Bible study during recess. However, we note that Plaintiff’s counsel failed to acknowledge that he was asking the district court to extend existing law.”

B. Student Graduation Messages


The Eleventh Circuit upheld a policy permitting graduating seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies. The court found that the student messages made possible by this policy were purely private speech.


Parents of an eight grade student brought suit against the district, claiming that it violated her rights under the federal and state constitutions by requiring her to remove a sentence with religious content from the speech that she gave at the school’s “Moving Up Ceremony. The sentence was the following “As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace.” The court initially determined that the speech constituted “school-sponsored expressive activities” because students, parents and members of the public might reasonably perceive the speech “to bear the imprimatur of the school.” Facts that led to this conclusion included that the district managed and funded the ceremony, the school’s name and insignia appeared on banners, signs and programs and occurred at a school sponsored assembly in the school auditorium. Applying the Hazelwood standard, the court found that the sentence in the speech was purely religious and that the district engaged in content-based discrimination, because the district was excluding religion as a general subject matter as opposed to a religiously informed viewpoint on an otherwise secular subject matter. Given that the sentence was a direct quote from the Old Testament and the student’s characterization of it as a “blessing,” the court upheld the district’s decision requiring her to remove the sentence. The court found the district’s desire to avoid violating the Establishment Clause represented a “legitimate pedagogical concern.”
C. Student Dress and Appearance

1. **Zamecnik v. Indian Prairie Sch. Dist. No. 204**, 636 F.3d 874 (7th Cir. 2011).
   
   The Seventh Circuit Court of Appeals held that a school improperly precluded students from wearing shirts that read “be happy, not gay” because the school could not present facts that forecast a substantial disruption caused by the shirts.

   
   The Fifth Circuit Court of Appeals held that a school district’s grooming policy substantially burdened a student with a sincere religious belief by precluding the student from wearing his hair visibly long.

D. Religious Information Distribution

   
   The parent of a fifth grade student sued the school district after school officials refused to allow her to distribute invitations to her classmates for a Christmas party at her church. The district permitted students to hand out invitations to birthday parties, Halloween parties, Valentine’s dances and the like during non-instructional time. The district contended that its refusal to allow distribution of the flyer was supported by safety concerns and the possibility that parents might believe that the party was a school-sanctioned event. The Third Circuit applied the *Tinker* standard and determined that the district failed to identify any disruption caused by the student’s invitation and ruled in favor of the parent.

   
   Five high school students that belonged to a religious youth group alleged that school officials violated their First and Fourteenth Amendment rights by preventing them from distributing 2,500 rubber fetus dolls to other students at two high schools in the district. On the first day of distribution, the schools experienced doll-related disruptions. For example, some students dismembered the dolls and threw them like balls in the school and other students used them to plug school toilets. Teachers at both schools complained that students’ preoccupation with the dolls disrupted classroom instruction and one test was canceled because students engaged in name calling and insults over the topic of abortion. Two weeks later, the students attempted again to distribute the dolls at school, but were prevented from doing so by school administrators. On that same day, students were allowed to distribute Valentine’s Day-related items. The district also allowed the group to distribute other religiously-themed items that did not disrupt the school environment. The district had both written and unwritten policies regarding on-campus distributions. Applying the *Tinker* standard, the circuit court upheld the district’s action in refusing to allow the fetus doll distribution because the district demonstrated that the prior distribution caused substantial disruption and the decision to stop the distribution was not based on religion. The court also upheld the policy regarding on-campus distribution that required administrative pre-approval because it was clearly defined, embodied the *Tinker* standard and contained adequate procedural safeguards that placed reasonable limits on official discretion by requiring school officials to approve or deny a request within five school days and to provide written explanation of any denial along with an appeal process. Finally, the court concluded that district policy was not unconstitutionally vague and that school officials did not violate students’ equal protection or free exercise rights.

Four elementary students and their parents sued the district because they were prohibited from distributing written religious materials. Items that the children attempted to distribute included a candy cane pen along with a religious message that contained “The Legend of the Candy Cane,” tickets to a passion play – a “dramatic representation of the scenes connected with the passion and crucifixion of Jesus,” and pencils that were inscribed with the words, “Jesus loves me this I know for the Bible tells me so.” The court determined that the principals were entitled to qualified immunity because the rights asserted by the students and their parents were not clearly established. The court chose to clarify the law and held that *Tinker* applies in an elementary setting but that the age of the student may impact the extent of their speech rights. “In other words, to extend *Tinker*’s protections to public elementary schools is not necessarily to hold that the speech rights of elementary students are coextensive with those of older students.” The court limited its findings on the merits to the district’s restriction of the distribution of the pencils after school and outside of school, finding a violation of the First Amendment. The court declined to rule on the constitutionality of the remaining incidents.

IV. **TEACHER RELIGIOUS SPEECH**

A. **Religious Displays**


A high school math teacher displayed signs in his classroom that said “In God We Trust,” “One Nation Under God,” “God Shed His Grace on Thee,” and similar messages. The teacher refused to provide any historical context for the messages and the administration directed him to remove the signs. The teacher sued claiming that the district violated his federal free speech rights. He claimed that other teachers were permitted to display sectarian viewpoints such as Tibetan prayer flags; a John Lennon poster with “Imagine” lyrics and a Ghandi poster. On appeal, the court held that the school acted within its authority. A teacher in the classroom speaks as an employee of the district, not as an individual. Further, the school district was appropriately concerned about avoiding a violation of the Establishment Clause. Finally, while the other displays may have had religious content, they were not used to endorse or inhibit religion. The school’s use of the other displays was entirely secular and fostered no entanglement with religion.


A teacher contended that the district violated her First Amendment right to free speech by imposing restrictions via a counseling letter that directed her to remove various religiously-themed postings in her classroom. The court dismissed the action stating that schools may direct teachers to refrain from expressing religious viewpoints in the classroom and have a constitutional duty to make certain that subsidized teachers do not inculcate religion. The court rejected the teacher’s claim that the district’s action violated the Establishment Clause by conveying an impermissible, government-sponsored message of disapproval of and hostility toward the Christian religion. Applying the *Lemon* test, the court found that the district action had the secular purpose of avoiding the perception of religious endorsement and did not excessively entangle the district in religious matters.
V. CURRICULAR AND ATTENDANCE ISSUES

A. Course Credit for Religious Instruction


Students and parents challenged a district policy that allowed public school students to receive two academic credits for off-campus religious instruction offered by private educators. The policy was specifically authorized under a state law that allowed up to two credits for the completion of released time classes in religious instruction if: (1) the instruction is evaluated on the basis of purely secular criteria substantially similar to that used to evaluate similar classes at established private high schools when transferring credits from a private school to a public school and (2) the decision to award credit is neutral to and does not involve any test for religious content or denominational affiliation. The court upheld the policy, finding that the released time grades are handled much like the grades of a student who wishes to transfer from an accredited private school into a public school within the district. The school district policy placed responsibility for evaluating released time courses on accredited private schools, not the public school. The public school accepts the grades without individually assessing the quality or subject matter of the course, trusting the private school accreditation process to ensure adequate academic standards.

B. Contracting with a Religious Institution to Provide Instruction


Former teachers at a public alternative school sued the school board for closing the school and contracting with a self-proclaimed “religious institution” to operate the school, claiming that such action violated the teachers’ Establishment Clause and due process rights. State law required each school board to provide alternative-school services for students in grades 7-12. The county school board, facing a budget shortfall, abolished its alternative school and contracted for its students to be educated in the secular, alternative-school program at a private Christian school. The private school had two separate programs: (1) a residential component which maintained a religious character and included deliberate religious instruction and (2) a day program which did not feature deliberate religious instruction. The elements of concern included that day students voluntarily attended assemblies in the school chapel which contained religious imagery, but the assemblies did not include religious content; students were required to submit a weekly family-feedback form – and reports cards that contained a quote from the Gospel of Luke and religious references on the school’s website, including a statement that the school “will take care of a child’s ‘spiritual and religious life’.” Monies paid to the private school were put in the school’s general operating account, leaving the school with the discretion over the expenditure of the money. Applying the endorsement analysis, the court concluded that a reasonable observer would not interpret the school board’s relationship with the private school as a governmental endorsement of religion. According to the court, “it is clear that the taxpayers, School Board, parents and students all benefited from the relationship between the Board and [the private school]. While this benefit was being conferred, parents and children received only a slight exposure to religious content.” Focusing on the specific facts in this case and the budget crisis the district faced, the court determined that there was no Establishment Clause violation.
2. Teaching of Evolution/Creation Science/Intelligent Design

   A statute barring teaching of evolution was held to be unconstitutional.

   Alabama statute requiring that teaching of evolution be balanced by teaching of "creation science" ruled unconstitutional because it did not have a secular purpose.

   The U.S. District Court for the Middle District of Pennsylvania ruled that the Dover School Board's policy requiring the teaching of intelligent design (ID) in science classes violates the Establishment Clause. The court applied both *Lemon* and endorsement tests. It rejected the argument that ID is a valid scientific alternative to evolution. It concluded that a reasonable observer would view ID as just a new form of creationism, a theory that the United States Supreme Court had long held was nothing more than a religious belief. Addressing the disclaimer read to ninth graders, the district court found that an objective student would view the disclaimer as a "strong official endorsement of religion."

D. Objections to Curricular Materials

   A Pennsylvania statute requiring that "at least 10 verses from the Holy Bible be read, without comment, at the opening of each public school on each school day" was declared unconstitutional.

   The Establishment Clause is not violated by a school's observance of holidays which have both a religious and a secular basis through programs containing music, art, literature and drama having religious themes and by the temporary display of religious symbols.

   The allegation that the book, *The Learning Tree*, unconstitutionally advanced an antitheistic faith was rejected.

   The United States Court of Appeals for the Eleventh Circuit reversed the lower court’s decision ordering Alabama's public schools to remove 44 history, social studies and home economics textbooks for use in Alabama's public schools because the Court found such books to teach the religion of "secular humanism."
   Although the court noted that some of the material in the contested books may in fact be offensive to the religion of those bringing the lawsuit, the state's purpose in instilling in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decision-making, outweighed any possible interference with the religious rights of those involved in the lawsuit. The court noted that if school districts are precluded from including material in books that is offensive to any particular religious belief, "there would be very little that could be taught in the public schools."
5. **Virgil v. School Bd. of Columbia County, Florida**, 862 F.2d 1517 (11th Cir. 1989).
   A school board's decision to bar use of a humanities text because of its objectionable selections (including Chaucer's *The Miller's Tale*) was upheld because the decision was based on pedagogical concerns.

   Allegation was rejected that the *Impressions* reading series unconstitutionally advances the occult.

7. **Pledge Cases**
   
   The court held that reciting the Pledge of Allegiance in public schools, including the phrase "under God," does not abridge the Establishment Clause.

   Michael Newdow, the non-custodial parent of a child attending school in the Elk Grove Unified School District (EGUSD) in northern California, objected to his daughter having to listen to the daily recitation of the Pledge of Allegiance by her classmates. Mr. Newdow's objection was based on the words "under God." The class recited the pledge daily in conformity with California statutes requiring each day to begin with "appropriate patriotic exercises". After finding that Mr. Newdow had standing to bring his suit in federal court, the Ninth Circuit ruled that Elk Grove's policy instructing school administrators to lead students in a daily voluntary recitation of the Pledge violates the First Amendment's Establishment Clause. EGUSD filed a petition for certiorari with the U.S. Supreme Court. The Court granted review, and reversed the Ninth Circuit, 8-0, on the issue of standing.

   Justice Stevens delivered the Court's opinion. Justices Kennedy, Souter, Ginsburg, and Breyer joined him. Chief Justice Rehnquist, joined by Justice O'Connor and Justice Thomas as to Part I, wrote a concurring opinion. Justices O'Connor and Thomas also wrote separate concurrences. Justice Scalia took no part in the consideration or decision of the case. Justice Stevens noted that the doctrine of standing involves two separate strands: (1) Article III standing, which enforces the U.S. Constitution's requirement of case or controversy; and (2) prudential standing, which involves "judicially self-imposed limits on the exercise of federal jurisdiction." He concluded that the standing issue hinged on the prudential strand. Under that strand, he found that the Court has "customarily declined to intervene ... [into] the realm of domestic relations." He concluded that for the Court to answer the federal question at issue in the case could affect "delicate issues of domestic relations" best left to state courts. While acknowledging both California law and the First Amendment recognize Mr. Newdow's right to communicate with his child, Justice Stevens found that right a far cry from the right to represent his daughter's interests in court as "next friend."

   He concluded that if the Supreme Court ruled on the Establishment Clause issue it could affect the trial court's ruling by implying that Mr. Newdow had parental rights a state trial court had denied him and that are currently under dispute at the state appellate court level. Justice Stevens said, "In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law." As a result, the Court held that Mr. Newdow, having been deprived under California law of the right to sue as
"next friend," lacks prudential standing to bring suit in federal court.

While Chief Justice Rehnquist concurred in result with the majority, he dissented from its use of standing to dispose of the case. Instead, he concluded that on the merits of the case that EGUSD's policy that requires teachers to lead willing students in reciting the Pledge, including the words "under God," does not violate the Establishment Clause. Addressing the standing issue, the Chief Justice concluded that the custodial mother's "veto power" in regard to the daughter's education "does not override [Mr. Newdow's] right to challenge the [P]ledge ceremony." Turning to the Establishment Clause issue, he concluded that the Pledge is a patriotic ceremony that is not transformed into a religious one merely because the Pledge contains the descriptive words "under God." In Chief Justice Rehnquist's view, to toss out the Pledge would be an unwarranted extension of the Establishment Clause, giving an objecting parent a "heckler's veto". He concluded that the only constitutional restriction on reciting the Pledge is that "schoolchildren be entitled to abstain from the ceremony if they choose to do so."

Justice O'Connor, like the Chief Justice, concluded that Mr. Newdow has standing. Her analysis of the Establishment Clause issue focused on references to God and religion as being nothing more than a ceremonial acknowledgement of the role religion played in the forming the nation's founding principles of liberty. Justice Thomas also agreed that Mr. Newdow had standing. He concluded that the policy "does not expose anyone to the legal coercion associated with an established religion."

**iii. Newdow v. Rio Linda Union School District, 597 F.3d 1007 (9th Cir. 2010).**

In this case, Michael Newdow again sought judicial review of a California statute codifying the words of the “Pledge of Allegiance” to include the words “under God” and requiring that school districts in that state begin each school day with a patriotic exercise, such as a teacher-led recitation of the Pledge. Under district policy, students could choose not to participate in the flag salute for personal reasons. Newdow and the other plaintiffs alleged that such activity constituted a violation of the Establishment Clause.

The court first examined the statute and district policy under the *Lemon* test. In particular, the plain wording of the statute and policy expressed a secular purpose, the court ruled, which was to encourage the performance of patriotic exercises in public school. It does not mandate the text of the Pledge or any other particular exercise. Thus, the statute and policy are neutral toward religion.

Next, the court determined that under the *Lemon* test, the Pledge itself is constitutional. Citing a multitude of Supreme Court decisions, the court noted that “not every mention of God or religion by our government…is a violation of the Establishment Clause.” The court determined that it was required by Supreme Court precedent to examine the history and context of “one Nation under God” to discern Congress’ “ostensible and predominant” purpose in enacting the Pledge. The court examined the Pledge in its entirety, not simply the words at issue and found that the Pledge is essentially one of “allegiance to our Republic, not of allegiance to God…” Further, Congress’ “ostensible and predominant” purpose in enacting the Pledge and amending it over time was patriotic, not religious, and the inclusion of “under God” was meant as a description of the nation’s historical principles of governance, affected by religious belief that all people are entitled to certain inalienable rights given to them by the “Laws of Nature and Nature’s God,” which government must secure. It was intended to inspire patriotism, and the allegedly offending phrase does not turn that patriotism into a religious activity, nor does it advance or inhibit religion.

The court also examined the Pledge under the “endorsement test” and determined that the purpose and effect of the Pledge are predominantly patriotic, not religious. Further, a reasonable observer aware of the history and origins of the words in the Pledge would view it “as a product of this nation’s history and political philosophy.”

Finally, the court applied the “coercion test” to analyze whether students in California’s schools were being coerced to participate in a religious exercise, even though the statute and policy lacked any threat of penalty. The court agreed that while some coercion may exist for elementary school
students to participate, the activity was patriotic in nature, not religious. Thus, while children are coerced into “doing all sorts of things in school, such as learning to read,” no students were forced to participate involuntarily in a religious exercise.

The U.S. Courts of Appeal in the First, Fourth, Fifth and Seventh Circuits have held similar statutes and school policies to be constitutional. See Freedom from Religious Foundation v. Hanover School District, 2010 WL 4540588 (1st Cir. 2010); Myers v. Loudoun County Public Schools, 418 F.3d 395 (4th Cir. 2005); Croft v. Perry, 624 F.3d 157 (5th Cir. 2010); Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993).

E. Requests to Include Religious Materials


   A charter school sued the Idaho Public Charter School Commissioner challenging its policy prohibiting the use of sectarian or denominational texts in public schools. The Ninth Circuit ruled that the First Amendment’s speech clause does not give charter school parents, teachers or students a right to have primary religious texts included as part of the school curriculum. Charter schools are governmental entities and the curriculum presented in such schools is not the speech of teachers, parents or students, but that of the Idaho government, according to the court. “A public school’s curriculum, no less than its bulletin boards, is “an example of the government opening up its own mouth, because the message is communicated by employees working at institutions that are state-funded, state-authorized, and extensively state-regulated.”


   During a curricular “show and tell” activity at the school district designed to let students share their individual interests, learn about others, and develop socialization skills, a mother wanted to read Bible passages to students in a kindergarten classroom, claiming her son had selected the Bible as his favorite book and wanted to share it with the class. The principal refused to allow her to do so, believing it proselytized a specific religious point of view.

   Noting the uniqueness of a kindergarten classroom in First Amendment jurisprudence, the court highlighted that when classes are engaged in curricular activities and supervised by a teacher, they are nonpublic and speech therein may be regulated by the district. Particularly with young students, schools must be mindful that the line between school-sponsored speech and merely allowable speech by others not associated with the district can be easily blurred.

   Here, the student was permitted to share his religious beliefs with his classmates through his “All About Me” poster, which featured a depiction of a church and a statement that he liked to attend church. However, reading from a Bible conveys a strong religious message to a very young, captive audience and may confuse students as to whether the message is school-sponsored. Thus, the district’s actions in refusing to permit the parent to read from the Bible were reasonable.


   A father brought a section 1983 action against his children’s New Jersey school district to challenge the district’s policy prohibiting the performance of celebratory religious music at school-sponsored events, claiming such policy violated the Establishment Clause as he believed it disapproved of religion. The district’s policy with respect to religious holidays, programs and concerts specified that holidays were to be celebrated in a secular manner, celebratory religious
music was prohibited, and religion and its traditions could only be taught when appropriate to the curriculum.

The court held that the policy did not convey hostility towards religion. It had a secular purpose and constituted the district’s attempt to maintain neutrality towards religion and avoid perceived government endorsement of religious holidays. In addition, the policy permitted music appropriate to the curriculum to be presented objectively.

4. **Nurre v. Whitehead**, 580 F.3d 1087 (9th Cir. 2009).

A member of a high school wind ensemble sued her school district, claiming that the district violated the Establishment Clause when it refused the ensemble the opportunity to play “Ave Maria,” based on its religious title. The song had been selected by senior members of the group for its performance at the school’s graduation ceremony. The district’s administration discussed the selection and believed it could be seen as endorsing religion. While the district had permitted religious music to be performed at other concerts throughout the year, those pieces were performed for artistic value and alongside an equal number of other non-religious works. The district viewed graduation as unique and where such contemporaneous balanced performances were impracticable. Additionally, the district had received numerous complaints regarding the choir’s performance the previous year of a song at graduation which contained references to God, heaven and angels.

The court applied the *Lemon* test and determined that the district’s actions did not demonstrate hostility toward religion. The district prohibited the performance of “Ave Maria” to avoid conflict with the Establishment Clause, which the court deemed a valid secular purpose. The district’s actions in prohibiting the performance was in reaction to prior complaints concerning the performance of religious music at the graduation ceremony and was intended to maintain neutrality toward religion. Finally, the court found no excessive administrative or political entanglement with religion in the district’s actions.

F. **Opt Out Requests**


The United States Court of Appeals for the Sixth Circuit reversed the decision of the United States District Court for the Eastern District of Tennessee which had ordered the Hawkins County School District to allow children who had religious objections to a certain basal reading series to be excused from, or “opt-out” of reading class whenever any of these books were taught. Under this "opt-out" plan, the students would go to a study hall or library during reading class and would study reading later at home with their parents.

The court of appeals held that parents and children could not successfully claim that their freedom to practice their religion had been violated by the school district's mandating that the children attend classes and be "exposed" to the basal reading series. The Court reasoned, in essence, that the right to practice one's religion is not burdened simply by mandating one to be exposed to ideas with which one disagrees.

G. **Requests for Exemption from Attendance Requirements**


Applying compelling state interest/least restrictive alternative test, the Court required the state to exempt Amish children from compulsory school attendance past the eighth grade.
2. Immunizations


Parents of minor unvaccinated children brought a lawsuit challenging the constitutionality of the state’s statutory vaccination requirement and a state regulation allowing unvaccinated children to be excluded from public school based on an outbreak of vaccine-preventable disease. The state statute provides medical and religious exemptions from the immunization mandate. Some of the parents sought a religious exemption and were denied and other parents received the religious exemption for their children, but then their children were excluded from school when a fellow student was diagnosed with chickenpox. The court referenced the United States Supreme Court decision in *Jacobsen v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), stating that it is well settled that the state may compel vaccinations. The court further held that mandatory vaccination does not violate the Free Exercise Clause. “The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the later to ill health or death.” The court noted that the state law goes beyond what the Constitution requires by providing a religious exemption.


The parent sued state, local and school district officials claiming that they violated her constitutional rights in refusing to admit her daughter to public school without the immunizations required by state law. The only exception under state law was in cases where a physician provides a certificate showing that the immunization for the diseases “is impossible or improper or other sufficient reason why such immunization has not been done.” The parent received such certificate from a child psychiatrist. An exemption was initially granted and then subsequently denied after a school nurse challenged the certificate. The court cited to prior United States Supreme Court decisions where the court found immunization requirements to be a valid exercise of the state’s police power and that claims of religious freedom must give way to the compelling interest in containing the spread of contagious diseases through mandatory inoculation programs. The court also rejected a challenge to the law for its failure to provide a religious exemption.

H. Religious Release Time

   A public school may not provide release time for religious instruction on public school property.

   A public school may provide release time for students to attend religious classes off of its premises.

   The manner in which the district released students from instruction to enable them to obtain religious education off school premises was consistent with New York state law and regulations. The plaintiffs claimed that the district’s implementation of its release time program violated their constitutional rights, because they were subjected to “abusive religious invective” from students who participated in the program. This happened, they alleged, because teachers and principals were not adequately trained to handle the situation. The Second Circuit panel rejected each of the students’ claims, finding that their lawsuit
attempted to re-litigate the facial validity of the statute and was not really an “as applied” challenge at all. According to the court, the Pierces had not distinguished their claims in “any meaningful way” from those made in Zorach. As in Zorach, the Second Circuit panel found no evidence that Sullivan West expended any public money in support of its religious release time program. Participation in the program was purely voluntary; the district did not in any way pressure or coerce students to participate.

4. **Moss v. Spartanburg County Sch. Dist.** 683 F. 3d 599 (4th Cir. 2012)

The court upheld a school district’s release-time program that enabled students to leave campus for religious instruction at an unaccredited Bible school but receive academic credit at their public schools. The plaintiffs claimed that the provision of credit improperly advanced religion. They claimed that the practice constituted “Christian favoritism” and made them feel like outsiders. The school district argued that the transfer of credits was no different than a transfer that occurs when a student transfers from a private religious school into the public school system. The court of appeals found no excessive entanglement between the public school and the Bible school.

VI. FACILITIES ISSUES

A. Equal Access


   The Equal Access Act does not violate the First Amendment's proscription against establishment of religion. The Act requires public high schools to allow student religious and political clubs to meet on the same basis as other non-curriculum-related activities. Although the decision reinforces the constitutionality of the 1984 Equal Access Act, it expands the definition of the term "non-curriculum-related" to refer to any student group that does not directly relate to a school's curriculum if its subject matter is taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a course or results in academic credit. Under the Equal Access Act, if a school district permits non-curriculum related student groups to use school premises, then the following rules must be observed:
   - Meetings must be voluntary and initiated by students.
   - There can be no sponsorship of the meetings by the school, the government, or its agents or employees.
   - Employees or agents of the school or government may attend only in a non-participatory capacity.
   - Meetings must not interfere materially or substantially with the orderly conduct of educational activities within the school.
   - Non-school people may not direct, conduct, control, or regularly attend activities of student groups.


   The United States Supreme Court declined to review a decision from the Second Circuit Court of Appeals which held that a school district could not prohibit a student Bible club from requiring that certain officers be Christians. Students challenged the district's prohibition, alleging that it violated the Equal Access Act. The district argued that the club’s requirement violated the district's non-discrimination policy. The lower court ruled in favor of the district, finding that the non-discrimination policy allowed the club to meet on the same basis as other
clubs and that an exemption to the non-discrimination policy would constitute an excessive entanglement with religion in violation of the Establishment Clause. In reversing the lower court, the Second Circuit determined that the speech protected by the Equal Access Act includes the selection of the club's leadership positions. Furthermore, it ruled that a religious club may insist that those in certain leadership positions have a commitment to its cause in the same way that a secular club may do so.


   The U.S. Court of Appeals for the Eighth Circuit has ruled that an elementary school teacher can participate in an after-school religious club for children, even if the meetings are held at the same school where she is assigned to teach. A federal district court had ruled that the teacher could participate in the club at another school but not at the school where she is assigned. Barbara Wigg was denied permission by school district officials to participate in meetings at her school of a children’s "Good News Club" sponsored by the Child Evangelism Fellowship. The officials cited Establishment Clause concerns. Ms. Wigg sued, alleging violation of her free speech rights. The district court denied her request to order the school district to allow her to participate in the club at her school. However, it ruled that Ms. Wigg could participate in club meetings held at other schools without raising the same Establishment Clause endorsement concerns, because a reasonable observer would not view her as a teacher conducting another class but merely as a private citizen. The Eighth Circuit agreed with the district court that once Ms. Wigg went to another school, a reasonable observer would view her as any other private citizen exercising her right to religious freedom and speech. However, the appellate court went further, finding that no reasonable observer would mistake Ms. Wigg’s participation even at her own school for the school’s endorsement of religion, because the school day will have ended and participation is limited to students who have parental permission to participate.


   In this case, the Boyd County High School was ordered to open its doors for a gay-straight student alliance. The Gay Straight Alliance (GSA) was initially approved as a club by the district, but public outcry against it caused the school board to suspend all clubs from meeting on school grounds. The GSA brought suit under the Equal Access Act after the district continued to allow several other student groups to meet on school grounds. Under the Act, any public secondary school which accepts federal funds and provides an opportunity for one or more non-curriculum related groups to meet on school grounds during non-instructional time cannot exclude others based on the content of their speech. According to the court, a school cannot deny access to a student group because student and community opposition substantially interferes with the school’s ability to maintain discipline. The student group’s own activities must be the source of the disruption in order to overcome the right of access granted by the EAA. On this basis, the court granted the GSA a preliminary injunction allowing it to meet on school grounds, submit announcements, and use the school newspaper to the same extent as other school clubs.

B. **Use of School Facilities by Outside Religious Groups**


   Under the free speech clause of the First Amendment, a school that creates a limited public forum cannot exclude speech on a permissible subject (in this case, family values) simply because of its religious viewpoint or perspective. Allowing a film on family values from a Christian perspective to be shown on school premises after school hours would not violate the Establishment Clause.

The Supreme Court ruled a school district violated a religious club’s free speech rights when it barred the club from using school facilities after hours based on the club’s religious viewpoint. The school district’s actions constituted impermissible viewpoint discrimination that was not justified by any Establishment Clause concerns.

Because both parties agreed that a limited open forum had been created, the Court began its analysis from the premise that a school district can restrict speech based upon the type of speech, provided its restriction does not discriminate against speech on the basis of its viewpoint. Using *Lambs Chapel* and *Rosenberger* as guides, the Court examined whether the school district’s exclusion of the club constituted viewpoint discrimination. It found no distinction between the presentation of films that discussed family values from a religious perspective in *Lambs Chapel* or the student publication that addressed issues from a religious perspective in *Rosenberger* and the club’s use of prayer, Bible study, games and songs with religious themes to teach character development and morals. Pointing out that teaching character development and morals was a permissible purpose under the school district’s policy, the Court concluded that excluding the club because it proposed to teach character development and morals from a religious perspective, is the same type of viewpoint discrimination that the Court had struck down in *Lambs Chapel* and *Rosenberger*.

Turning to the school district’s argument that even if it engaged in viewpoint discrimination, its interest in avoiding an Establishment Clause violation outweighed the club’s interest in gaining equal access to the school’s facilities, the Court concluded that there was no realistic danger that the public would perceive the school’s action of allowing the club to meet as an endorsement of religion.


Previously, a lower federal court had enjoined the City School District of the City of New York from enforcing a regulation which precluded the use of school facilities for religious worship services. After determining that the district’s schools are the only location at which the Bronx Household of Faith could meet “as a full congregation … without having to curtail other of their religious practices,” the lower court concluded the enforcement of the district’s regulation would violate constitutional protections safeguarding the free exercise of religion.

On appeal, the U.S. Court of Appeals for the Second Circuit disagreed, explaining that the Free Exercise Clause of the federal Constitution prevents government from “prohibiting” the free exercise of religion. It does not “require government to finance a subject’s exercise of religion.”

In addition, the regulation and its enforcement did not violate the Establishment Clause which requires the separation of church and state. There was no evidence that the regulation was motivated by hostility toward religion. Nor would it be perceived as such by a reasonable observer given the range of religious activity otherwise permitted by the regulation. Neither did the regulation require the district to become excessively entangled in religious matters, because the Bronx Household of Faith itself characterized the proposed activities as religious worship services. Instead, the regulation constituted a reasonable attempt to avoid the risk of liability under the Establishment Clause.

According to the Second Circuit, a school board that “makes a reasonable, good faith judgment that it runs a substantial risk of incurring a violation of the Establishment Clause by hosting and subsidizing the conduct of religious worship services” does not act unconstitutionally in disallowing such use. If a court later finds the specific use requested does not, in fact, violate the Establishment Clause, should that have the effect of invalidating a good-faith judgment by a school board? No, according to the Second Circuit. A ruling to the contrary would be
inconsistent with prior judicial precedent, the court said. It also would place school districts “unfairly...in an impossible position of being compelled...to risk” a violation of one of the religion clauses if they wrongly guess the “exact contours” of Establishment Clause.

The court explained that if use of school facilities for religious worship services does not actually constitute a violation of the Establishment Clause, a district’s refusal to allow such use would violate the Free Exercise Clause. But if allowing such use causes a sufficient appearance of endorsement of religion, there would be a violation of the Establishment Clause. This does not mean, however, that a school district would get “a free pass, avoiding all scrutiny” simply by claiming that the motivation behind its actions is the observance of separation of church and state favored by the Establishment Clause. The constitutionality of rules that focus on religious practices in the interest of observing the concerns of the Establishment Clause “must be assessed neutrally on all the facts.”

In a prior ruling, the Second Circuit had already upheld the validity of the regulation at issue in *Bronx Household of Faith* against a claim that its enforcement would violate constitutionally protected free speech rights. According to the Second Circuit, the contested regulation did not constitute forbidden viewpoint discrimination against religion. Its bar on the conduct of religious worship services did not restrict “the use of school facilities by religious groups to teach religion, sing hymns, recite prayers, and express or advocate their religious point of view.” Instead, the regulation effected “a content-based exclusion of a particular category of activity” which was permissible given the district’s “reasonable and good faith belief” that allowing religious worship services in its schools might be perceived as an unlawful endorsement of religion under the Establishment Clause and expose the district to a “substantial risk of liability.”

Editor’s Note: Despite the court ruling described above, New York City Mayor Bill de Blasio said April 8, 2014, that he would permit faith groups to continue to use public school buildings. “I just want to emphasize that any organization of any faith can apply for space,” de Blasio said. “Everyone is entitled to their opinion, and the previous administration had a different opinion.”


The court ruled that a school district could refuse to rent its facilities to a church for religious worship services on the grounds that state law and the district’s own policies and regulations prohibited such use. The issues in this case mirror those in *Bronx Household of Faith v. Community School District No. 10*, with the exception that the district in this case had previously granted access to school facilities to other churches for religious worship services and instruction. The district did not deny that such access had been permitted, but argued that it had been granted erroneously by an employee in the department responsible for such requests when the department’s director position was vacant. The court ruled that while past practice is a relevant factor in determining if a district has opened its limited forum to religious worship, it is not determinative when a district mistakenly grants access to its facilities for religious worship and instruction.


The U.S. Court of Appeals for the Third Circuit ruled that a New Jersey school district’s refusal to distribute promotional materials for a religious club in elementary schools, while distributing materials for secular clubs, violated the religious club’s free speech rights. The court also ruled that barring the religious club from distributing materials at "back-to-school night" events and from posting posters on school walls was unconstitutional. The court began by
rejecting the school district’s contention that the speech at issue was school-sponsored and, therefore, governed by *Hazelwood*. The school district had no hand in writing, paying for, producing, or approving the materials, the court noted, and the materials contained a disclaimer stating that the club was "not a school sponsored activity." The court found that the speech was private speech comparable to that in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Turning to the district’s argument that even if the speech were private, the district was permitted to regulate it because all three fora were closed to the public, the court concluded that a school district may not engage in viewpoint discrimination even in such a forum. On the central question of whether the district restrictions were based on permissible, viewpoint neutral criteria, the court concluded that the district committed viewpoint discrimination based on religion because its criteria technically should have excluded secular groups whose materials in fact were distributed, including groups promoting anything beyond "mundane recreational activities" and groups that "proselytize" in the loose sense they are recruiting members. In particular, the district’s criterion excluding all speech on "religion as a subject or category" flew in the face of U.S. Supreme Court precedent that private religious speech is afforded the same constitutional protections as private secular speech. In addition to impermissibly excluding religious speech, the district also discriminated against the club’s Christian orientation, because it distributed materials for nonsectarian groups, such as the Boy Scouts and the Girl Scouts, which profess a general faith in God. Finally, the court rejected the district’s argument that its restrictions were justified by the need to avoid violating the Establishment Clause. Applying the test established in *Lemon v. Kurtzman*, along with the endorsement and coercion tests, the court concluded that nothing in the access demanded would create an atmosphere of coercion, a perception of endorsement, or excessive entanglement between government and religion.


The U.S. Court of Appeals for the Fourth Circuit has ruled that a Maryland school district’s policy limiting classroom distribution of materials from outside groups based on the type of group, rather than the content of the materials, still violates a religious group's free speech rights. Montgomery County Public Schools (MCPS) and Child Evangelism Fellowship of Maryland (CEF) have been involved in protracted litigation over MCPS’s classroom materials distribution policy. The Fourth Circuit previously ruled that MCPS’s denial of CEF’s request for elementary school teachers to distribute flyers promoting the group’s after-school Good News Club constituted impermissible viewpoint discrimination. In response to that ruling, the MCPS school board adopted a revised policy limiting classroom distribution to materials from (1) MCPS; (2) other county, state, or federal agencies; (3) parent-teacher organizations; (4) licensed day care providers operating on-campus; and (5) non-profit youth sports leagues. Another group still could gain access to the classroom distribution forum if one of these approved groups sponsored or endorsed its message. The new policy placed no restrictions on the content of the materials, religious or otherwise. But because CEF did not fit into any of these five categories, its materials were not distributed. A district court upheld this policy, finding that it passed the "reasonableness" test applicable to rules governing access to a nonpublic forum because MCPS merely sought to reduce the “burgeoning number of organizations” distributing their materials in the classroom by “limit[ing] the subject matter to activities of traditional educational relevance to students and the categories of speakers to organizations involved in those activities.”

The Fourth Circuit found the district court’s forum analysis flawed, because even in a limited public or non-public forum, government restrictions on speech are subject to more than a test of reasonableness. They must also be viewpoint neutral, the appeals court determined, saying "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper
exclusion of viewpoints.” As a result, the court concluded that it need not rule on what type of forum was at issue but instead turned to the central issue: whether the policy protects against viewpoint discrimination.

The court found “unconvincing” CEF’s contention that the revised policy is not viewpoint neutral because MCPS continues to exclude CEF’s flyers. Circumstances have changed since the prior appeal, the court pointed out, because at that time MCPS had “no discernible policy governing access to the take-home flyer forum.” Rather, the school district had acknowledged it had engaged in viewpoint discrimination by excluding the flyers but justified this practice based on Establishment Clause concerns. The school district crafted its new policy to address the problem of viewpoint discrimination. The court rejected CEF’s contention that the mere fact that it continues to be excluded from the forum means MCPS has not changed its policy: “[I]f MCPS established an access policy that was reasonable and eliminated viewpoint discrimination, we would hold that it did not violate CEF’s free speech rights whether or not CEF thereby gained admission to the take-home flyer forum. It is entirely proper for a governmental entity to attempt to conform its policies to the demands of the First Amendment. Even when litigation prompts the change, if a revised policy passes constitutional muster, a court will not penalize the government for transgressions under an earlier policy.”

On the other hand, the court agreed with CEF’s second argument that the revised policy unconstitutionally gives MCPS “unfettered discretion” to deny access to the forum for any reason. While acknowledging that “unbridled discretion analysis” is not precisely the same when applied to a limited public or nonpublic forum, as opposed to a traditional public forum, the court held that even in a case involving a nonpublic or limited public forum, a policy that allows officials to deny access for any reason or fails to provide sufficient safeguards to prevent viewpoint discrimination will not survive constitutional scrutiny. After reviewing the plain language of the revised policy and the circumstances surrounding its adoption, the court concluded that MCPS “assertedly limit[s] access to certain purportedly neutral speakers but actually reserves to itself unbridled discretion to permit or deny access to any speaker for any reason it chooses.” Specifically, the policy states that officials (1) “may approve” fliers from, or sponsored or endorsed by, one of the five types of eligible groups but provides no guidelines as to how they should exercise this discretion; (2) may withdraw approval of any flier that somehow “undermine[s] the intent of the policy,” although the intent of the policy is a very “broad” one of “establish[ing] a forum for communications from various community groups and governmental agencies to parents without disrupting the educational environment.” As a result, the policy “utterly fails to provide adequate protection for viewpoint neutrality…” and “[b]ecause the policy offers no protection against the discriminatory exercise of MCPS’s discretion, it creates too great a risk of viewpoint discrimination to survive constitutional scrutiny.”

C. Public Display of Religious Symbols

   A Kentucky statute requiring the posting of the Ten Commandments on public classroom walls was declared unconstitutional.

   The City of Pawtucket's inclusion of a nativity scene in its Christmas display does not "taint" an otherwise constitutional display because, overall, the display had legitimate secular purposes of celebrating the Christmas holiday and depicting origins of that holiday. In addition to the creche, the display included a Santa Claus, a Christmas tree, a reindeer, a clown, a teddy bear and other holiday items. The Court stated that the display may advance religion "in a sense," but any benefit conferred is "indirect, remote and incidental." A concurrence by Justice O'Connor
propounded that even if a governmental practice has the "primary effect" of advancing or inhibiting religion, "what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."


A nativity scene in the county courthouse, which included a message from a local religious society, violated the Establishment Clause because it had the primary effect of endorsing Christianity. However, a display outside the city county building of a 45-foot decorated Christmas tree, an 18-foot Chanukah menorah and a "salute to liberty" message from the mayor was upheld as merely acknowledging the cultural diversity of this country and the "different traditions for celebrating the winter-holiday season."


The U.S. Supreme Court ruled that two courthouse displays of the Ten Commandments violate the Establishment Clause. The Court rejected the counties' argument that the secular purpose prong of *Lemon* should be abandoned because "true 'purpose' is unknowable" and its use as a criterion is "merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent." The Court also rejected the counties' argument that inquiries into purpose should be limited to viewing each government action in isolation. The Court found that counties' displays shared many similarities with the classroom Ten Commandments display invalidated in *Stone v. Graham*, 449 U.S. 39 (1980).


The U.S. Supreme Court ruled that a Ten Commandments display on the grounds of the Texas State Capitol does not violate the Establishment Clause. The plurality opinion, while conceding that the Ten Commandments convey a religious message, found that the context in which the Ten Commandments are used demonstrates that the display also conveys a secular moral message about proper standards of social conduct and a message about the historical significance of those standards and the law. Chief Justice Rehnquist distinguished the Court's holding in *Stone v. Graham*, 449 U.S. 39 (1980), which disallowed a classroom Ten Commandments display, as the "consequence of the 'particular concerns that arise in the context of public elementary and secondary schools.'" Nothing in *Stone*, he argued, would extend its holding "beyond the context of public schools." Justice Scalia's concurrence emphasized his belief that "there is nothing unconstitutional in a State's favoring religion generally."


The New York City Department of Education’s holiday display policy neither offends the Establishment Clause of the First Amendment nor infringes upon the First Amendment free exercise rights of parents whose children attend the city’s public schools, according the Second Circuit Court of Appeals.

The department’s policy explicitly allows the display of the menorah, a symbol of Judaism, and the star and crescent, a symbol of Islam, as part of larger eclectic holiday displays in the City’s public schools, but forbids display of the crèche, a symbol of Christianity. In upholding the constitutionality of the department’s policy, the court did not rule that the display of a crèche in a public school setting would never be constitutionally permissible. Moreover, the court acknowledged that there could be circumstances where the “deliberate exclusion of the religious symbol of one faith from a display that includes the religious symbols of other faiths could communicate the official favoritism or hostility among religious sects forbidden by the Establishment Clause.” But the court held that this was not such a case. The department policy
allowed display of the menorah and the star and crescent at least in part because the department considered them secular symbols. Conversely, it disallowed the crèche, among other reasons, because of its display of a deity.

Andrea Skoros, the mother of two elementary students attending city schools claimed that exposing her children to the menorah and the star and crescent, while excluding the crèche, favored Judaism and Islam over Christianity. Skoros claimed that this violated the Establishment Clause by giving these religions favored status in the public school system. She also claimed this practice violated her free exercise rights, because it infringed upon her parental prerogative to determine her children’s religious upbringing. The circuit panel found these arguments unavailing. The court concluded that the New York City Department of Education had “mischaracterized” the menorah, and the star and crescent, as secular symbols. In the court’s view they are “religious symbols.” Nonetheless, the court found that the department’s policy of permitting the inclusion of these symbols in holiday displays, while excluding the crèche, did not violate the Constitution, because on the whole, the department’s policy and practice allowed a wide variety of holiday displays with religious components associated with a multitude of religions, including Christianity. In fact, holiday decorations associated with Christianity that were displayed included Christmas trees, Santa Claus, reindeer, candy canes, gingerbread boys and girls, tinsel garlands, strings of lights, as well as Christmas wreathes, candles and presents. The court concluded that “no reasonable objective observer would perceive from the totality of circumstances...that the purpose of the challenged display was, in fact, to communicate to City schoolchildren any official endorsement of Judaism or Islam or any dismissal of Christianity.” Moreover, the court found that the policy had a legitimate secular purpose “to foster mutual understanding and respect for many beliefs and customs stemming from [the] community’s religious, racial, ethnic and cultural heritage.”

7. *Weinbaum v. City of Las Cruces, New Mexico*, 541 F.3d 1017 (10th Cir. 2010).

A citizen brought suit alleging, in part, that the school district violated the Establishment Clause by displaying a symbol including three crosses on the district’s maintenance vehicles, outside its sport complex, and in two pieces of district artwork. The plaintiff alleged these displays had the purpose and effect of endorsing Christianity.

The court acknowledged the religious ties with the crosses, but also focused on the history and origins of the name of the city, Las Cruces (which means, in Spanish, “the crosses”). The city had long used the crosses as part of its symbol, such as on its city seal, official documents, brochures and advertisements such that it could not reasonably be said that the effect of the symbol was to endorse religion. The district, too, had adopted the symbol as part of its school identity.

The court analyzed whether students, parents and members of the public would perceive the presence of the crosses in the city’s symbol as government conduct that bears the imprimatur of the school. The court found no endorsement issues by including the symbol on district vehicles. It helped school officials and parents readily identify them as belonging to the district, and aided in the school’s safety measures. The symbol was also present in a mural created and displayed by students in elementary schools, which included other readily identifiable local images such as nearby mountains and locally grown vegetation. But the court also saw no Establishment Clause violation here, as an objective observer would not view the mural’s creation and display as motivated by an intent to endorse religion, nor actually endorsing religion. As to the sculpture outside the sports complex, the court noted the district’s purpose in selecting the artwork with the Las Cruces symbol was secular in nature: to beautify the sports complex, to serve as a monument to excellence, and to embody the community of Las Cruces. An objective observer would understand that the sculpture was meant to reflect Olympic athletic excellence and does not endorse Christianity.
D. Use of Religious Facilities


Students and their parents sued the school district for holding high school graduation ceremonies and related events at a Christian church rented by the district alleging the practice violated the Establishment Clause. The court concluded that conducting a public school graduation ceremony in a church that, among other things, featured staffed information booths with religious literature and banners with appeals for children to join “school ministries” violated the Establishment Clause in that it conveys a message of endorsement. According to the court, “the sheer religiosity of the space created likelihood that high school students and their younger siblings would perceive a link between church and state.” Of significance to the court was the fact that there were other suitable graduation sites. In addition, the court determined that the decision to hold graduation at the church was religiously coercive in that it directed students “to attend a pervasively Christian, proselytizing environment”. The court was careful to note that its decision was based on the specific facts presented and that it was not ruling out that under other circumstances, i.e., the only meeting place available or in a small community ravaged by a natural disaster, a church, synagogue or mosque could hold public school ceremonies in a constitutionally appropriate manner.

VII. RELIGIOUS ACCOMMODATIONS

School districts continue to receive requests by students for accommodations in their educational programming based upon their religious beliefs and ideology. As school districts grapple with questions of accommodation, they must balance competing concerns. First, school districts must consider what the federal and state constitutions and state statutes require or permit, which very often will be less than clear. Second, schools should try to ensure that all students seeking a religious accommodation are treated in a manner that their families, the media, and the community will perceive as fair. At the same time, school districts need to ensure that all students are receiving a complete, well-rounded education consistent with the district’s policies. A school district that wants to minimize conflict over accommodation issues may want to seek information about the requirements of various students’ faiths before an accommodation request is made, seek feedback from all stakeholders when faced with a request, and allow constitutional principles and flexibility and creativity to drive the decision-making process.

Most recently, school districts are facing religious accommodation requests from Muslim students who, the U.S. State Department lists as the fastest growing religions in the United States. In fact, Muslims are the nation’s second largest faith following Christianity with a United States population of over 6 million.

Muslims have sought accommodation with respect to diet, clothing, gender relations, participating in certain curricular activities, religious celebrations of others, Muslim holidays, pilgrimages, fasting and prayer.

As Muslims do not recognize any single individual or institution as authoritative, interpretations of the rules governing Muslim life vary widely. However, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the U.S. Supreme Court cautioned courts against trying to discern the “correct” tenants of a particular faith. However, if a student rather than his or her parents seek an accommodation, to make sure the student is not simply trying to circumvent the school district’s rules, the district may want to verify with his or her parents that the accommodation is being sought as part of the family’s religious practice. Also, school districts should take proactive steps to make sure Muslim student are safe at school and not bullied or and harassed.
Such steps might include encouraging students to learn about each other’s religious or philosophical views, ensuring bullying and harassing policies adequately address religion, and actively enforcing the policy.

(See Inquiry & Analysis—“The Next Wave of Religious Accommodation: Responding to Requests by Muslim Students” by Lisa Soronen, National School Boards Association, Alexandria, Virginia)
Religious Freedom Restoration Act

By Randy Bennett,
Tennessee School Boards Association, Nashville, TN

The Religious Freedom Restoration Act (RFRA) of 1993,1 was originally passed by Congress with the stated purpose of restoring “the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972); to guarantee its application in all cases where free exercise of religion is substantially burdened;” and additionally “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”2

Congress was reacting to Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), a U.S. Supreme Court decision that originated in Oregon and dealt with the ceremonial and sacramental use of peyote in a religious context. Justice Scalia summed up the issue as follows: “This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.” Id. at 874. A divided Court reversed the Oregon Supreme Court, holding that “(b)ecause respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.” Id. at 890.

The RFRA again came under the scrutiny in City of Boerne v. Flores, 521 U.S. 507 (1997). In Boerne, the Catholic Archbishop of San Antonio, applied for a building permit to enlarge a church in Boerne, Texas. The local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which, they argued, included the church. The Archbishop brought a lawsuit challenging the permit denial under, inter alia, RFRA. The district court concluded that by enacting RFRA, Congress exceeded the scope of its enforcement power under § 53 of the Fourteenth Amendment. The court certified its order for interlocutory appeal, and the Fifth Circuit reversed, finding RFRA to be constitutional. In the holding reversing the Fifth Circuit, Justice Kennedy wrote: “Congress’ discretion is not unlimited, however, and the courts retain the power, as they have since Marbury v. Madison (citation omitted), to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and federal balance.” 521 U.S. at 536.

According to the National Conference of State Legislatures,4 since 1993, 21 states have enacted state RFRA laws. The intent was to echo the federal RFRA, but the laws are not

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2 42 USCA § 2000bb(b)(1-2).
3 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. U.S.C.A Const. Amend. XIV, § 5.
necessarily identical to the federal laws. As of October 15, 2015, the most recent states to enact a RFRA were Arkansas and Indiana.

The map below and the statute reference chart that follows are from the National Conference of State Legislatures and include the states that have enacted RFRA legislation.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Statute</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Ala. Const. Art. I, §3.01</td>
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<tr>
<td>Arizona</td>
<td>Ariz. Rev. Stat. §41-1493.01</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2015 SB 975, enacted April 2, 2015</td>
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<tr>
<td>Connecticut</td>
<td>Conn. Gen. Stat. §52-571b</td>
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<tr>
<td>Florida</td>
<td>Fla. Stat. §761.01, et seq.</td>
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<tr>
<td>Idaho</td>
<td>Idaho Code §73-402</td>
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<tr>
<td>Indiana</td>
<td>2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015</td>
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<tr>
<td>Jurisdiction</td>
<td>Bill Number</td>
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<tr>
<td>Arkansas</td>
<td>HB 1228</td>
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<tr>
<td>Arkansas</td>
<td>SB 975; <em>Signed by Governor</em> – 4/3/2015</td>
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The following chart indicates RFRA legislation filed in 2015:

<table>
<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>HB 1171</td>
<td>Concerns a state freedom of conscience protection act.</td>
</tr>
<tr>
<td>Georgia</td>
<td>HB 29</td>
<td>Relates to state government; provides for the preservation of religious freedom; provides for a short title; provides for findings; provides for definitions; provides for penalties; provides for the granting of relief; repeals conflicting laws.</td>
</tr>
<tr>
<td>Georgia</td>
<td>HB 218</td>
<td>Relates to state government; provides for the preservation of religious freedom; provides for the granting of relief; provides for definitions; provides for a short title; provides for findings; provides for an effective date; repeals conflicting laws.</td>
</tr>
<tr>
<td>Georgia</td>
<td>SB 129</td>
<td>Relates to state government; provides for the preservation of religious freedom; provides for legislative findings; provides for definitions; provides for the granting of relief; provides for a short title; provides for an effective date; repeals conflicting laws.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>HB 1160</td>
<td>Prohibits the State or any county from burdening any person's right to exercise religion absent that burden being the least restrictive means of furthering a compelling governmental interest.</td>
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<tr>
<td>State</td>
<td>Bill Number</td>
<td>Description</td>
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<tr>
<td>Indiana</td>
<td>HB 1632</td>
<td>Provides that a state or local government action may not substantially burden a person's right to the exercise of religion unless it is demonstrated that applying the burden to the person's exercise of religion is essential to further a compelling governmental interest, and the least restrictive means of furthering the compelling governmental interest.</td>
</tr>
<tr>
<td>Indiana</td>
<td>SB 101; Signed by Governor – 3/26/2015</td>
<td>Prohibits a governmental entity from substantially burdening a person's exercise of religion unless the governmental entity can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering the compelling governmental interest; provides a procedure for remedying a violation; specifies that the religious freedom law applies to the implementation or application of a law.</td>
</tr>
<tr>
<td>Indiana</td>
<td>SB 50; Signed by Governor – 4/2/2015</td>
<td>Indicates that the law related to adjudicating a claim or defense that a state or local law, ordinance, or other action substantially burdens the exercise of religion of a person: (1) does not authorize a provider to refuse to offer or provide services,</td>
</tr>
</tbody>
</table>
facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public; (2) does not establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public; and (3) does not negate any rights available under the Constitution of the State of Indiana. Defines the term provider.

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<thead>
<tr>
<th>State</th>
<th>Bill Number</th>
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<tbody>
<tr>
<td>Indiana</td>
<td>SB 568</td>
<td>Provides that a state or local government action may not substantially burden a person's right to the exercise of religion unless it is demonstrated that applying the burden to the person's exercise of religion is essential to further a compelling governmental interest, and the least restrictive means of furthering the compelling governmental interest.</td>
</tr>
<tr>
<td>Michigan</td>
<td>SB 4</td>
<td>Creates Michigan religious freedom restoration act.</td>
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<tr>
<td>Montana</td>
<td>HB 615; Failed</td>
<td>Revises laws related to the fundamental rights under the constitution; relates to</td>
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<tr>
<td>State</td>
<td>Bill</td>
<td>Description</td>
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<tr>
<td>Nevada</td>
<td>AB 277</td>
<td>Prohibits state action from substantially burdening a person's exercise of religion under certain circumstances.</td>
</tr>
<tr>
<td>Nevada</td>
<td>SB 272</td>
<td>Prohibits state action from substantially burdening a person's exercise of religion under certain circumstances.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>SB 550</td>
<td>Enacts the North Carolina religious freedom restoration act.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>HB 1371</td>
<td>Relates to the Oklahoma Religious Freedom Act; relates to definitions; adds certain definition; prohibits state or subdivision from making certain claim under certain action; provides for codification; provides an effective date.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>SB 440</td>
<td>Relates to the Oklahoma Religious Freedom Act; relates to definitions and burden upon free exercise of religion; modifies definitions; authorizes certain action; authorizes certain relief; provides an effective date.</td>
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<tr>
<td>Oklahoma</td>
<td>SB 610</td>
<td>Relates to discrimination; relates to the Oklahoma Religious Freedom Act; provides an effective date.</td>
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<tr>
<td>State</td>
<td>Bill Number</td>
<td>Description</td>
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<tr>
<td>Oklahoma</td>
<td>SB 723</td>
<td>Relates to the Oklahoma Religious Freedom Act; relates to definitions and burden upon free exercise of religion; modifies definitions; authorizes certain action; authorizes certain relief; provides an effective date.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>SB 127</td>
<td>Relates to the South Carolina Religious Freedom Act; prohibits restrictions on the free exercise of speech or religion during the course of any locality, municipality, county, or other state instrumentality proceeding in violation of the first amendment of the United States or Article I, Section 2 of the Constitution of South Carolina.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>HB 1220; <em>Failed - Adjourned</em></td>
<td>Provides for the free exercise of religion and to declare an emergency.</td>
</tr>
<tr>
<td>Texas</td>
<td>HJR 55</td>
<td>Proposes a constitutional amendment relating to the free exercise of religion; provides that the state, a county, municipality, political subdivision or agency may not burden a person's free exercise of religion unless necessary to further a compelling governmental interest and is the least restrictive means; provides that a homeowners' association may not burden a person's free exercise of religion unless necessary to further a compelling quasi-</td>
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<tr>
<td>State</td>
<td>Measure</td>
<td>Description</td>
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</tr>
<tr>
<td>Texas</td>
<td>HJR 125</td>
<td>Proposes a constitutional amendment relating to a person's free exercise of religion.</td>
</tr>
<tr>
<td>Texas</td>
<td>SJR 10</td>
<td>Proposes a constitutional amendment relating to a person's free exercise of religion.</td>
</tr>
<tr>
<td>Utah</td>
<td>HB 66; Failed</td>
<td>Relates to religious freedom; affirms a person's religious freedom to act within the confines of the person's religious beliefs.</td>
</tr>
<tr>
<td>Utah</td>
<td>HB 322; Failed</td>
<td>Adds religious liberty to the list of exceptions in the Governmental Immunity Act; establishes the Religious Liberty Act; declares the Act is in furtherance of the rights and protections under the United States and State constitutions; coordinates the application of this bill to other statutory provisions; permits a person or entity seeking relief under the Act to obtain judicial relief, attorney fees, and costs for violations of a person's religious liberty.</td>
</tr>
<tr>
<td>Utah</td>
<td>HJR 5; Failed</td>
<td>Relates to the protection of religious rights; proposes to amend the Utah Constitution</td>
</tr>
</tbody>
</table>
to enact a provision relating to religious rights.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Bill Number</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Virginia</td>
<td>HB 2508; <em>Failed - Adjourned</em></td>
<td>Creates the West Virginia Freedom of Conscience Protection Act.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>HB 2830; <em>Failed - Adjourned</em></td>
<td>Concerns the West Virginia Freedom of Conscience Protection Act.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>SB 487; <em>Failed - Adjourned</em></td>
<td>Creates Freedom of Conscience Protection Act.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>HB 83; <em>Failed</em></td>
<td>Relates to religious freedom; creates a Religious Freedom Restoration Act; provides definitions; limits specified governmental actions that burden religious freedom as specified; authorizes claims and defenses against governmental action that burden religious freedom; provides for severability of the act.</td>
</tr>
</tbody>
</table>

The following chart outlines legislation filed during 2016:\(^6\)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Bill Number</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>HB 1180</td>
<td>Concerns a person's free exercise of religion.</td>
</tr>
<tr>
<td>Georgia</td>
<td>HB 757</td>
<td>Relates to marriage generally; provides that religious officials shall not be required to perform marriage ceremonies in violation of their legal right to free exercise of religion; relates to selling and other trade</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Jurisdiction</th>
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</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>practices to change certain provisions relating to days of rest for employees of business and industry; protects property owners which are religious institutions against infringement of religious freedom; provides for waiver of sovereign immunity. Section 6 of the bill introduces language similar to other state RFRAs.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>HB 2764</td>
<td>Provides that government should not substantially burden religious exercise without compelling justification. Establishes protections for religious freedom, including in the laws concerning public accommodations and marriage.</td>
</tr>
<tr>
<td>Iowa</td>
<td>HB 2032</td>
<td>Relates to the preservation of religious freedom.</td>
</tr>
<tr>
<td>Iowa</td>
<td>HB 2200</td>
<td>Relates to the standard of judicial review. Provides a claim or defense when a state action burdens a person’s exercise of religion. Includes effective date provisions.</td>
</tr>
<tr>
<td>Iowa</td>
<td>SB 2171</td>
<td>Relates to the standard of judicial review and providing a claim or defense when a state action burdens a person's exercise of religion. Includes effective date provisions.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Bill Number</td>
<td>Summary</td>
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</tr>
<tr>
<td>Kentucky</td>
<td>SB 180</td>
<td>Defines protected activities, protected activity provider, and protected rights. Provides legislative intent. Prohibits any statute, regulation, ordinance, order, judgment, or other law or action by any court, commission, or other public agency from impairing, impeding, infringing upon, or otherwise restricting the exercise of protected rights by any protected activity provider. Prohibits a protected activity provider from being fined, imprisoned, held in contempt, or otherwise punished or found liable.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>SB 2822</td>
<td>Clarifies the application of the Religious Freedom Restoration Act.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>HB 55</td>
<td>Relates to religious freedom. Amends the human rights act to prohibit the application of any law that burdens the free exercise of religion. Amends the New Mexico religious freedom restoration act to prevent discriminatory action by a person or a government agency in response to a person's free exercise of religion. Provides for notice.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>SB 898</td>
<td>Relates to the Oklahoma Religious Freedom Act. Relates to burdens upon free exercise of religion,</td>
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<tr>
<td>Jurisdiction</td>
<td>Bill Number</td>
<td>Summary</td>
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<tr>
<td>Virginia</td>
<td>HB 791</td>
<td>Relates to the Act for Religious Freedom. Reaffirms that the religious rights asserted in a specified section of the code are the natural and unalienable rights of mankind, and this declaration is the policy of the commonwealth.</td>
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<tr>
<td></td>
<td><em>Status: Enacted – 3/7/2016</em></td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>HB 2508</td>
<td>Creates the Freedom of Conscience Protection Act.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>HB 4012</td>
<td>Establishes the States Religious Freedom Restoration Ac. Ensures that all cases where state action is alleged to substantially burden the exercise of religion, that a compelling interest test is mandated, and, strict scrutiny is applied. Provides definitions. Addresses applicability,</td>
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<td></td>
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<td>construction, remedies, and severability.</td>
</tr>
</tbody>
</table>

As of April 5, 2016, thirty-eight (38) state legislatures have either enacted or considered RFRA legislation.