Public Education: Religious Rights and Values in Florida Schools

Pacific Justice Institute

PROTECTING FAITH, FAMILY, AND FREEDOM

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An Open Letter to Parents, Teachers, Administrators, and School Boards

Pacific Justice Institute is dedicated to the protection of religious freedom, parental rights, and other civil liberties. Since the beginning of our organization in 1997, we have assisted thousands of parents, students, teachers, and school administrators with a wide range of issues involving civil rights in public education.

As someone concerned with the public school system, you may have questions about how the religious freedom rights of students relate to the "separation of church and state." Or you may be interested in what rights parents have with respect to their child's education. This booklet will provide you with important information on critical issues confronting public education today. From religious clubs to immunization exemptions, from prayer on campus to tolerance of students' political and religious beliefs in the classroom, we have designed this resource to clarify the important legal rights and responsibilities of parents, students, teachers, and school administrators in public education.

If you have any questions about the information presented in this booklet, or would like to receive legal assistance, please do not hesitate to contact the Pacific Justice Institute at (916) 857-6900.

Sincerely,

Brad Dacus, President

PART I: STUDENTS' RIGHTS

I. Equal protection for religious expression in public schools

Florida law provides anti-discrimination protections for students, parents, and school personnel who express their faith. "A school district may not discriminate against a student, parent, or school personnel on the basis of a religious viewpoint or religious expression. A school district shall treat a student's voluntary expression of a religious viewpoint on an otherwise permissible subject in the same manner that the school district treats a student's voluntary expression of a secular viewpoint."[1]

A. Religious coursework

"A student may express his or her religious beliefs in coursework, artwork, and other written and oral assignments free from discrimination. A student's homework and classroom assignments shall be evaluated, regardless of their religious content, based on expected academic standards relating to the course curriculum and requirements. A student may not be penalized or rewarded based on the religious content of his or her work if the coursework, artwork, or other written or oral assignments require a student's viewpoint to be expressed."[2]

B. Religious activities (including prayer) for students and school personnel

"A student may pray or engage in religious activities or religious expression before, during, and after the school day in the same manner and to the same extent that a student may engage in secular activities or expression. A student may organize prayer groups, religious clubs, and other religious gatherings before, during, and after the school day in the same manner and to the same extent that a student is permitted to organize secular activities

[1] F.S. § 1002.206(2).
[2] F.S. § 1002.206(3)(a).

and groups."[3] Further, "a school district may not prevent school personnel from participating in religious activities on school grounds that are initiated by students at reasonable times before or after the school day if such activities are voluntary and do not conflict with the responsibilities or assignments of such personnel."[4]

C. Religious student speakers

"A school district shall adopt a policy that establishes a limited public forum for student speakers at any school event at which a student is to speak publicly."[5] The policy cannot discriminate against a student's religious expression (if the expression is on a permissible subject) and must provide neutral criteria for the selection of student speakers at school events, among other things.[6] The school district policy must contain a written or oral disclaimer "that the student's speech does not reflect the endorsement, sponsorship, position, or expression of the school district"[7] and must deliver the disclaimer "at all graduation events and any other event at which a student speaks publicly."[8]

D. Clothing

"A student may wear clothing, accessories, and jewelry that display a religious message or symbol in the same manner and to the same extent that secular types of clothing, accessories, and jewelry that display messages or symbols are permitted to be worn."[9]

E. Employment discrimination

"A school district shall comply with the federal requirements in Title VII of the Civil Rights Act of 1964, which

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[3] F.S. § 1002.206(4)(a).
[4] F.S. 1002.206(4)(b)(1).
[5] F.S. § 1002.206(5)(a).
[6] *Id.*
[7] F.S. § 1002.206(5)(a)(4).
[8] F.S. § 1002.206(5)(b).
[9] F.S. § 1002.206(3)(b).

prohibits an employer from discriminating against an employee on the basis of religion."[10]

II. Equal access to school facilities

Both federal and Florida law provide religious groups with equal access to school facilities as secular groups.

A. The Equal Access Act

The federal Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-7074, provides that it is "unlawful for any ***public secondary school*** which receives federal financial assistance and which has a ***limited open forum*** to deny equal access . . . to . . . any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings."[11] (Emphases added).

A "limited open forum" is created "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[12] The EAA does not violate the Establishment Clause of the U.S. Constitution's First Amendment.[13] The EAA does not apply to elementary schools. 42 U.S.C. § 1983 creates a private right of action to enforce the EAA, and nominal damages are recoverable when diligently sought by a plaintiff who successfully proves a violation of the Act and has not waived the claim by its conduct.[14]

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[10] F.S. § 1002.206(4)(b)(2).
[11] 20 U.S.C. § 4071(a).
[12] 20 U.S.C. § 4071(b); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1182-83 (D. Utah 1999).
[13] *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Westfield High Sch. L.I.F.E Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).
[14] *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cnty.*, 249 F. Supp. 3d 1286 (M.D. Fla. 2017).

1. The EAA's terms

The three most important terms in the EAA are "meeting," "noninstructional time," and "noncurriculum related student group." "Meeting" includes "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum."[15] Meetings (1) must be voluntary and student-initiated; (2) must be without sponsorship from the school, the government, or its agents or employees; (3) must have the presence of employees or agents of the school or government in a nonparticipatory capacity; (4) Cannot materially and substantially interfere with the orderly conduct of educational activities within the school; and (5) Cannot be directed, conducted, controlled, or regularly attended by non-school persons.[16]

"Noninstructional time" means "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[17] In a seminal case, a court defined "noninstructional time" to include meetings during lunch time and found that a school violated a student's right in denying her

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[15] 20 U.S.C. § 4072(3); *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987) (holding that a gathering of junior high school students to distribute a religious newspaper in school hallways during noninstructional time does not fall within protection of Equal Access Act, because (1) distribution is not "meeting," as it is not type of activity in which student groups are already permitted to engage under school's limited open forum, and the distribution of a school newspaper as extension of English curriculum is not comparable to students' noncurriculum-related newspaper distribution, and (2) "meeting" conducted by students is not voluntary in true sense of word.)

[16] 20 U.S.C. § 4071(c); *See also Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000) (holding that nonschool persons did not "direct, conduct, control" a public high school student's group seeking recognition and meeting space, merely because the group's name was recommended by national organization, or because nonstudents met with group members following their application for recognition in order to offer information and moral support.)

[17] 20 U.S.C. § 4072(4); *See also Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211(3d Cir. 2003) (Under the plain meaning of "noninstructional time," the court found that the high school's activity period met that definition where it fell between homeroom period and first classroom period; during the activity period, at least one noncurriculum related group met and students were not allowed to leave.)

religious club the opportunity to meet during lunch as other clubs were allowed to.[18] Specifically, the court held that the lunch hour was noninstructional time within the meaning of the EAA because all students took lunch at the same time, no classes were held, and students were permitted to leave school grounds.[19] The court found that by permitting other noncurriculum related student groups to meet during the lunch hour, the school had established a limited open forum and, under the EAA, could not discriminate against the student's religious group in making school facilities available.[20] Other federal courts have come to the same conclusion concerning noninstructional lunch periods.[21]

A "noncurriculum related student group" is "any student group that does not directly relate to the body of courses offered by the school."[22] More specifically, "a student group directly relates to a school's curriculum (1) if the subject matter of the group is actually taught, or will be taught, in a regularly offered course; (2) if the subject matter of the group concerns the body of courses as a whole; (3) if participation in the group is required for a particular course; or (4) if participation in the group results in academic credit."[23] A group is not curriculum-related if its function is social activity planning and does not address concerns, solicit opinions, or formulate proposals pertaining to the body of courses offered by

[18] *Ceniceros by & Through Risser v. Bd. of Trustees*, 106 F.3d 878 (9th Cir. 1997).
[19] *Id.* at 881.
[20] *Id.*
[21] *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3rd Cir. 2003); *Doe v. Sch. Bd. for Santa Rosa Cty.* 264 F.R.D. 670, 682 (N.D. Fla. 2010); *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 180 (D. Mass. 2007); *Colin ex rel. Colin v. Orange Unified Sch. Dist*, 83 F. Supp. 2d 1135, 1142 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1182-83 (D. Utah 1999); *Chandler v. James*, 958 F. Supp. 1550, 1561 at n. 16 (M.D. Ala. 1997).
[22] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990).
[23] *Id*. at 239-240; *Straights & Gays for Equality v. Osseo Area Schs*., 471 F.3d 908 (8th Cir. 2006).

the school.[24]Applying these criteria, courts have summarily rejected the assertion that certain student groups like the Chess Club, Key Club, and National Honor Society are curriculum related while the Christian Bible Club is not.[25] Simply because particular student clubs might advance the "overall goal of developing effective citizens . . . enable[ing] students to develop lifelong recreational interests . . . [and] enhance[ing] students' abilities to engage in critical thought processes," does not make them sufficiently related to a school's curriculum so that application of the EAA may be avoided.[26]

2. Religious activity in public secondary schools cannot be prohibited simply because it might interfere with elementary school activities.

In one U.S. Supreme Court case, a religious group wanted to use school grounds for "a fun time of singing songs, hearing a Bible lesson and memorizing scripture, and religious worship."[27] Even though the court felt the content was "quintessentially religious" and "decidedly religious in nature," it still held that the religious speech could not be excluded.[28] The school defended its policy by claiming that allowing a religious group on school grounds violated the Establishment Clause, but the court held that "[t]he guarantee of neutrality is respected, not offended, when the Government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[29]

This school also contended that because they had elementary school children on campus, they had a higher duty to

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[24] *Straights & Gays for Equality v. Osseo Area Schs.*, 540 F.3d 911 (8th Cir. 2008) (holding that cheerleading and synchronized swimming are not curriculum-related).
[25] *Pope v. East Brunswick Bd. of Educ*., 12 F. 3d 1244 (3rd Cir. 1993); *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291 (C.D. Cal. 2008).
[26] *Mergens*, 496 U.S. at 244.
[27] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001).
[28] *Id*. at 111.
[29] *Id*. at 114.

protect impressionable young children from a perceived government endorsement of religion. The court rejected this argument, however, finding that the Establishment Clause does not prohibit "private religious conduct during non-school hours merely because it takes place on school premises."[30] The court also found that the danger of students misperceiving the religious event as one which the school sponsored was no greater threat than students perceiving religious hostility if the school did not allow the event.[31]

3. Religious films in public secondary schools under the EAA

In another Supreme Court case, a private religious group wanted to use school grounds to present religious films.[32] The court held that as long as the films were shown during non-school hours, were open to the public, and the event was not sponsored by the school, there was no danger that the district would be perceived as endorsing religion.[33]

4. Advertising religious activities under the EAA

Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.[34] If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.[35]

Finally, elected officials and school employees are free to attend such services in their capacities as private citizens. "A school district may not prevent school personnel from participating in religious activities on school grounds that are initiated by students at reasonable times before or after the school day if such activities are voluntary and do not conflict with the responsibilities

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[30] *Id*. at 115.
[31] *Id*. at 118.
[32] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993).
[33] *Id*. at 395.
[34] *Hills v. Scottsdale Unified Sch. Dist*., 329 F.3d 1044, 1055 (9th Cir. 2003).
[35] *Id.*

or assignments of such personnel."[36] A public school teacher is constitutionally entitled to participate in religious club meetings after hours in the same school building in which she teaches and with some of her students.[37]

B. Florida Law

Unlike the EAA, Florida's equal access law applies to elementary schools as well:

> A school district shall give a religious group access to the same school facilities for assembling as given to secular groups without discrimination based on the religious content of the group's expression. A group that meets for prayer or other religious speech may advertise or announce its meetings in the same manner and to the same extent that a secular group may advertise or announce its meetings.[38]

> A student may pray or engage in religious activities or religious expression before, during, and after the school day in the same manner and to the same extent that a student may engage in secular activities or expression. A student may organize prayer groups, religious clubs, and other religious gatherings before, during, and after the school day in the same manner and to the same extent that a student is permitted to organize secular activities and groups.[39]

Furthermore, elected officials and school employees are free to attend such services in their capacities as private citizens. "A school district may not prevent school personnel from participating in religious activities on school grounds that are

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[36] F.S. § 1002.206(4)(b)(1).
[37] *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 815 (8th Cir. 2004) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).
[38] F.S. § 1002.206(4)(c).
[39] F.S. § 1002.206(4)(a).

initiated by students at reasonable times before or after the school day if such activities are voluntary and do not conflict with the responsibilities or assignments of such personnel."[40] However, the involvement of school personnel is subject to the meeting restrictions of the EAA.

In general, once a school opens up their grounds for use by outside groups, or passes out information about outside groups, the school then cannot refuse to do the same for religious organizations.

III. Starting religious clubs on campus

We are aware that many school administrators fear that allowing a Christian club on campus violates the legal doctrine of "separation of church and state." In contemporary society, there is a great deal of confusion about the meaning and legal authority of this phrase.

Contrary to popular belief, the U.S. Supreme Court has never insisted that there be an impenetrable wall between church and state.[41] Indeed, the Court has never thought it either possible or desirable to enforce a government regime of total separation in order to comply with the First Amendment's Establishment Clause.[42] Moreover, the "[wall of separation] metaphor . . . is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[43]

As a matter of law, the Constitution "affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any."[44] Therefore, limiting the existence or religious expression of a religious club based on a fear of violating the separation of church and state is clearly mislaid.

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[40] F.S. § 1002.206(4)(b)(1).
[41] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).
[42] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).
[43] *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984).
[44] *Id.* (internal citations omitted) (emphasis added).

Indeed, prohibiting religious clubs when other types of clubs are allowed on campus is a violation of the separation of church and state.

Over fifty years ago, the U.S. Supreme Court decided the *Tinker* case.[45] This case involved several students who were unconstitutionally suspended from school for wearing black armbands to class in protest of the war in Vietnam. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates," the Court noted.[46] Moreover, "students may not be regarded as closed-circuit recipients of only that which the . . . [government] chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[47]

Religious speech also falls within the scope of the *Tinker* case. The Supreme Court has affirmatively established that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[48] Privately expressed religious speech may not be constitutionally suppressed, or discriminated against, by any agent of the state on the sole reason that the speech or expression contains religious content.[49] Such discrimination necessarily amounts to an unconstitutional act of state sponsored hostility toward religion.[50] And although religious-based speech can often be controversial and cause uneasiness among some people who hear or see it, such effects are an inadequate basis for

[45] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968).
[46] *Id.* at 506.
[47] *Id.* at 511.
[48] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).
[49] *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Unions School Dist*., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).
[50] *See, generally, Lynch*, 465 U.S. 668 (1984).

allowing a public school to prohibit student religious expression on campus during non-instructional hours.[51]

In addition to being constitutionally protected, the right of students to meet on campus during non-instructional school hours is protected by the Equal Access Act.[52] The Act generally provides the following:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings.

If the school allows any non-curriculum groups to meet on campus, a faith-based group must be afforded the equal access.

IV. Sharing faith on campus

The U.S. Supreme Court has ruled that student speech is protected by the First Amendment as long as the speech is not a material or substantial disruption.[53] This means that when students can share their faith when they are outside of class.[54] Student speech can only be restricted when it substantially interferes with school discipline.[55] Interference, however, does not include some students finding the speech offensive; mere discomfort at the

[51] According to *Tinker*, 393 U.S. at 509, "in order for the State in the person of school officials to justify prohibition of a particular expression or opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."
[52] 20 U.S.C. § 4071 (2004).
[53] *Tinker*, 393 U.S. at 503 (1968).
[54] *Id.* at 503.
[55] *Id.* at 508-09.

subject matter is not sufficient to restrict student speech.[56] Finally, speech in a limited public forum may only be subject to viewpoint-neutral limitations.[57]

A. Right to use religious material when sharing faith

It is generally recognized that high school students can distribute religious materials containing passages from religious texts.[58] Students can also use religious tracts when they share their faith because tracts and other evangelistic materials constitute constitutionally protected speech.[59] As such, the First Amendment protects a student's right to distribute religious materials on campus.[60] Religious tracts are considered pure speech, and "students are protected by the U.S. Constitution in the school environment. Prohibitions of pure speech can be supported only when they are necessary to protect the work of the schools or the rights of other students."[61]

In fact, a school cannot even require students to give advance notice when they plan to pass out religious tracts.[62] Schools also lack the power to restrict students to a certain area when passing out religious tracts, unless the students are disrupting school discipline.[63]

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[56] *Id.* at 509.
[57] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).
[58] *Rivera v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989).
[59] *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).
[60] *Hemry v. Sch. Bd. of Colorado Springs Sch. Dist. No. 11*, 760 F. Supp. 856 (D. Colo. 1991); *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989); *Rivera*, 721 F. Supp. at 1189; *Thompson v. Waynesboro Area Sch. Dist*., 673 F. Supp. 1379 (M.D. Pa. 1987). *See also Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).
[61] *Rivera*, 721 F. Supp. at 1189.
[62] *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).
[63] *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994).

Finally, it should be noted that school authorities cannot censor student publications unless they can reasonably forecast that the expression will cause a substantial disruption of school activities or will invade the rights of others.[64] However, when the expression is a school-sponsored expressive activity (such as school publication), school authorities do not offend the First Amendment by exercising editorial control over the style and content of the student speech so long as their actions are reasonably related to legitimate pedagogical concerns.[65] In that case, it is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' rights under the U.S. Constitution.[66]

B. Right to speak during non-instructional time about a religious topic

If a school allows any students to speak publicly on campus about non-curriculum issues, the school cannot prohibit students from speaking about religion because it would be a violation of court precedent.[67] If a school allows any club to put on skits or lunchtime presentations, then the school must also allow students who want to put on religious skits or lunchtime presentations to do so as well.

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[64] *Tinker*, 393 U.S. at 514.

[65] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

[66] *Id.*

[67] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Prince v. Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002) ("While the school is certainly permitted to maintain order and discipline in the school hallways and classrooms by limiting the number and manner of both printed and oral announcements for all student groups, 20 U.S.C. § 4071(f), it may not discriminate among students based on the religious content of [their] expression.")

V. Praying on campus

A student has the right to engage in personal prayer on a public school campus.[68] Contrary to popular belief, students are not even forbidden from engaging in *public prayer* at school. Students may pray silently or aloud, read religious texts, or study religious materials in a non-disruptive manner when not engaged in school activities or instruction.[69] A prayer is not disruptive just because it is spoken aloud among a group of students, even a group that is assembled for some other purpose.[70] School authorities may regulate such activities, but must do so in a manner that does not discriminate against religious expression. Public school students may engage in privately-initiated, voluntary prayer *throughout the school day*.[71] Indeed, students can gather and pray on school property *before the school day officially begins*.[72] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[73]

Equal protection prohibits public schools from discriminating against religious expression. "A student may pray or engage in religious activities or religious expression before, during, and after the school day in the same manner and to the same extent that a student may engage in secular activities or expression. A student may organize prayer groups, religious clubs, and other religious gatherings before, during, and after the school day in the same manner and to the same extent that a student is permitted to organize secular activities and groups."[74]

Furthermore, "[a] school district may not prevent school personnel from participating in religious activities on school

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[68] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2001), *cert. denied*, 533 U.S. 916 (2001).
[69] *Tinker*, 393 U.S. at 509.
[70] *Chandler*, 230 F. 3d at 1317.
[71] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).
[72] *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 589-590 (N.D. Miss. 1996).
[73] *Tinker*, 393 U.S. at 512-13.
[74] F.S. § 1002.206(4)(a).

grounds that are initiated by students at reasonable times before or after the school day if such activities are voluntary and do not conflict with the responsibilities or assignments of such personnel."[75]

School board districts may set aside a period not to exceed two minutes for "silent prayer or meditation" at the beginning of a school day or school week.[76] Students may use this time to pray or meditate.[77] School officials may neither encourage nor discourage students from praying during such times.[78]

In sum, vocal or silent prayer that is initiated by students, does not have the appearance of school endorsement, and which is not disruptive is constitutionally protected.

VI. Taking religious texts to school and reading them there

A. Taking a religious text to school for use during non-curricular times

The Florida Constitution and the First Amendment to the U.S. Constitution ensure the right to free speech, which includes the right of religious expression.[79] School officials must recognize students' constitutional rights in the school setting.[80] The school setting includes not only the classroom, but also the lunchroom,

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[75] F.S. § 1002.206(4)(b)(1).
[76] F.S. § 1003.45(2).
[77] *Id.*
[78] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2001), *cert. denied*, 533 U.S. 916 (2001): In *Chandler*, the court ruled that students are allowed to take part in group prayers at school functions. The court reviewed a lower court's injunction against the enforcement of an Alabama statute permitting student-initiated prayer at school-related events. Finding that the injunction wrongly assumed that any religious speech in schools is attributable to the State, the appellate court held that the injunction was overbroad and found that as long as the speech was truly student-initiated and not the product of school policy which encourages it, the speech is private and protected.
[79] U.S. Const. Amend. I; Fla. Const. Art. I §§ 3,4; *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).
[80] *Tinker*, 393 U.S. at 506.

playing field, school yard, and hallways.[81] As a result, students are entitled to freely express their religious views by reading their religious texts during the school day. Like with prayers, a school can only prohibit a student reading a religious text only if it can show that the reading of the text "materially and substantially interferes" with the operation of the school or invades the rights of others.[82]

If students are allowed to attend such lunchtime religious meetings under the Equal Access Act (see above), then they are allowed to take religious texts to school and read them during other non-curricular times of the day (recess, free time, etc.). This is consistent with the rule that if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[83]

B. Taking a Bible to school for use during class time

If the student's personal Bible reading occurs during class or other curricular time, the government has some limited authority to restrict the activity. The reason for this is that classroom activities might reasonably be perceived to "bear the imprimatur [approval] of the school."[84] Thus, the school is able to exercise some discretion in order to avoid the appearance that it is endorsing a particular religion.[85]

Many schools have begun to implement a silent reading period at some point during the school day. During this period, the teacher sets aside time for students to read a book of their choosing. Because it occurs in the classroom and is specifically

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[81] *Tinker*, 393 U.S. at 512-13.
[82] *Id.* at 509.
[83] *Id.*
[84] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
[85] *Id.* at 271; *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990); *see also Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991).

designed to improve reading skills, schools may argue that the silent reading period is a curricular activity.

However, courts have yet to determine the exact classification of these silent reading periods. If they are found to be non-curricular time, students should absolutely be able to read their Bible as long as they do not "materially disrupt" the operation of the school. Even if these silent reading periods are classified as curricular, students may nonetheless be permitted to read their Bible if the school's silent reading policy allows students to read any *historical* or *educational* literature, or otherwise gives pupils discretion to read whatever they please. The school cannot restrict a student from reading the Bible while allowing all other literature.[86] Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.[87]

Discriminatory policies by schools which prevent students from reading the Bible would be an infringement on the student's religious expression. In order to justify even a content-based discrimination, the school must have a compelling state interest, and the policy must be narrowly designed to achieve only that interest.[88] In the absence of such a compelling interest, the school cannot restrict a student's personal Bible reading, even during a silent reading period.

Furthermore, school board districts may include "an objective study of the Bible and of religion" in a secular education program.[89] Public schools may not prohibit the Bible's presence or use in the classroom when "the Bible serves as a secular educational reference, is related to an approved curriculum, or is read in such a manner that students are insulated from undue

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[86] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).
[87] *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).
[88] *Widmar v. Vincent*, 454 U.S. 263 (1981).
[89] F.S. § 1003.45(1); *Stone v. Graham*, 449 U.S. 39, 42 (1980); and *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that the Bible can be part of a public school course so long as it is taught from a secular point of view).

religious influence or indoctrination."[90] Courts have also held that the Bible and other religious books have a legitimate place in public school libraries provided that the library's collection does not show (1) any preference for one religious sect over another, and (2) any preference for religious works over nonreligious works, and vice versa.[91]

VII. Writing papers and speaking on religious topics as class assignments

According to the U.S. Department of Education guidelines on religious expression in class assignments:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious perspective.[92]

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[90] *Roberts v. Madigan*, 702 F. Supp. 1505, 1516 (D. Colo. 1989).

[91] *Id.* at 1513. The court also wrote, "In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library. The Bible is regarded by many to be a major work of literature, history, ethics, theology, and philosophy. It has a legitimate, if not necessary, place in the American public school library." *Id.*

[92] Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html. This guidance, dated January 16, 2020, has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law.

Florida law adds:

"A student may express his or her religious beliefs in coursework, artwork, and other written and oral assignments free from discrimination. A student's homework and classroom assignments shall be evaluated, regardless of their religious content, based on expected academic standards relating to the course curriculum and requirements. A student may not be penalized or rewarded based on the religious content of his or her work if the coursework, artwork, or other written or oral assignments require a student's viewpoint to be expressed."[93]

Based on this standard, a student's work should not be rejected merely because the student expresses a religious viewpoint in the assignment. Teachers cannot prohibit student expression in a discriminatory fashion.

VIII. Including religious messages in speeches delivered at school-sponsored events

The U.S. Supreme Court has invalidated school board policies that allow school officials to invite, encourage, or arrange for speakers to deliver religious messages at school-sponsored events.[94] However, permitting students to independently decide whether to include religious messages in speeches delivered at such events may be acceptable. In such cases, the student speaker must be free to deliver any message, whether it be sectarian, secular, or both.[95]

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[93] F.S. § 1002.206(3)(a).

[94] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000); *Lee v. Weisman*, 505 U.S. 577, 587-588 (1992).

[95] *Adler v. Duval Cty. Sch. Bd.*, 250 F. 3d 1330, 1336-37, 1342 (11th Cir. 2001), *cert. denied*, 534 U.S. 1065 (2001). In *Adler*, the court upheld a lower court's ruling that the school board's policy of permitting a graduating student, elected by the graduating class, to deliver an unrestricted message at graduation ceremonies did not violate the Establishment Clause of the First Amendment on its face. The court ruled that the primary factor in distinguishing state speech from private speech is the element of state control over the content of the message. In distinguishing *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000), the

Under Florida law, "[a] school district shall adopt a policy that establishes a limited public forum for student speakers at any school event at which a student is to speak publicly."[96] The policy cannot discriminate against a student's religious expression (if the expression is on a permissible subject) and must provide neutral criteria for the selection of student speakers at school events, among other things.[97] The school district policy must contain a written or oral disclaimer "that the student's speech does not reflect the endorsement, sponsorship, position, or expression of the school district"[98] and must deliver the disclaimer "at all graduation events and any other event at which a student speaks publicly."[99]

IX. Acknowledging and celebrating religious holidays

Florida law is silent as to whether public schools can recognize religious holidays. School board districts decide which holidays to recognize, if any. For example, for years, Broward County schools have closed for Christmas, Good Friday, Yom Kippur, Rosh Hashanah, Hanukkah, and Passover, and there is an

court noted that, in *Santa Fe*, "the speech was 'subject to particular regulations that confine the content and topic of the student's message . . . and the policy 'by its terms, invites and encourages religious messages. . . . Those two dispositive facts are not present in [Duval County]. First, the Duval County policy does not contain any restriction on the identity of the student speaker or the content of the message that might be delivered. Indeed, school officials are affirmatively forbidden from reviewing the content of the message, and are expressly denied the opportunity to censor any non-religious or otherwise disfavored views. . . . Second, unlike *Santa Fe*'s policy, the Duval County policy does not 'by its terms, invite and encourage religious messages. . . . On the contrary, the policy is entirely neutral regarding whether a message is to be given, and if a message is to be given, the content of that message."

[96] F.S. § 1002.206(5)(a).

[97] *Id.*

[98] F.S. § 1002.206(5)(a)(4).

[99] F.S. § 1002.206(5)(b).

ongoing debate whether they should close for two Islamic holidays, Eid al-Fitr and Eid al-Adha.[100]

Schools and teachers are often concerned that they will be impermissibly endorsing religion by sponsoring activities such as making Easter eggs or Hanukkah dreidels, displaying Christmas trees, or performing Christmas musicals. In most cases, this concern is misplaced. It is constitutional for a public school to celebrate a religious holiday when there is a secular purpose to the celebration. For example, the use of calendars and seasonal displays recognizing a large variety of national, cultural, ethnic, and religious holidays has been upheld as serving the genuine secular purpose of broadening student understanding of, and respect for, various beliefs and customs.[101]

A particularly well-known, specific issue is whether the Establishment Clause of the First Amendment to the U.S. Constitution permits public schools to display religious holiday symbols (such as Nativity scenes). For the last four decades or so, the answer has been "it depends," because the U.S. Supreme Court has developed several tests for determining an answer. Decisions are left to the lower federal courts. The tests include:

1. The *Lemon* test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test states that a government policy does not violate the Establishment Clause only if:
    a. The policy has a secular purpose;
    b. The policy's principal or primary effect is neither to advance nor inhibit religion; and
    c. The policy does not tend to foster an "excessive entanglement" between government and religion.

[100] https://www.publicschoolreview.com/blog/are-muslim-holidays-coming-to-florida-schools; https://www.sun-sentinel.com/local/schools/fl-ne-broward-school-calendar-options-20191022-ea4oya5dxnhxpa5zahb46sx7ym-story.html.
[101] *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929 (D. N.J. 1993); *see also Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980) (upholding a public school Christmas musical production which included religious carols because the carols were presented "in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.")

2. The endorsement test from *Cty. of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) and from Justice Sandra Day O'Connor's concurring opinions in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). This test tries to modify the *Lemon* test to include a requirement that courts analyze whether the reasonable believer thinks that the government policy is endorsing religion.

3. The historical/traditional analysis test from *Lynch v. Donnelly*, 465 U.S. 668 (1984). This test holds that a government policy – usually a government's religious holiday display – does not violate the Establishment Clause so long as there is a history and tradition of Christmas displays featuring both secular and religious items.

4. The coercion test from *Lee v. Weisman*, 505 U.S. 577 (1992). This test states that a government policy violates the Establishment Clause if it psychologically coerces students into approving a religious practice to which they might object.

For now, it is sufficient to say that courts have upheld public school religious holiday displays that are placed alongside secular displays if the court uses the historical/traditional analysis.[102] This is because religious symbols alongside secular symbols send the secular message of inclusion and the freedom of one to choose his or her own beliefs.

X. Release time

[102] *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Woodring v. Jackson Cty.*, 986 F.3d 979 (7th Cir. 2021); *Sechler v. State College Area Sch. Dist*., 121 F. Supp. 2d 439 (M.D. Penn. 2000) (rejecting Establishment Clause challenge to "Winter Holidays" school display of various religious and secular items, such as various books, a Menorah, a Kwanzaa candelabra, a snowflake, etc., found to convey inclusive message rather than favoring one religion over others or favoring religion over non-religion).

A release time program is one where public school students are dismissed from their regular classes and receive instruction from someone other than school personnel. Instructors from outside of the public school system can conduct topical lessons on religious themes.

Florida law expressly authorizes a student's "absence for religious instruction."[103] This section states that "[e]ach district school board, in accordance with rules of the State Board of Education, shall adopt a policy that authorizes a parent to request and be granted permission for absence of a student from school for religious instruction or religious holidays."[104] The remaining state rules governing release time programs are found in Fla. Admin. Code R. 6A-1.09514. Among them is the requirement that each release time program "properly take into account the district's pupil progression plan as stated in Section 1003.21."[105] Consult the school board district's policy on "release time" programs.

Furthermore, all release time programs must comply with the restrictions that the U.S. Supreme Court placed on them in *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)[106] and *Zorach v. Clauson*, 343 U.S. 306 (1952), and which lower federal courts have built upon. These restrictions include:

1. The program must be administered in a religiously-neutral manner;

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[103] F.S. § 1003.21(2)(b)(1); See also F.S. 1002.20(2)(c): "A parent of a public school student may request and be granted permission for absence of the student from school for religious instruction or religious holidays, in accordance with the provisions of [F.S. §] 1003.21(2)(b)(1)."

[104] F.S. § 1003.21(2)(b)(1).

[105] Fla. Admin. Code R. 6A-1.09514(1)(d).

[106] "Technically, *McCollum* is not about released time, because it struck down an Illinois school board's policy of allowing religious indoctrination inside public schools during the school day. But the *McCollum* case established principles that have guided later rulings on how the First Amendment applies to schools." https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-public-schools/released-time/.

2. The program must be purely private, meaning that there cannot be any coercion, participation, encouragement, or discouragement from any public school official;

3. The public school cannot fund the program, other than de minimis administrative costs (such as the costs of a school board approving a local release time policy); and

4. The program cannot take place on public school premises.[107]

Schools can choose to allow release time classes to satisfy elective credits as long as the policy is neutrally stated and administered.[108] If the school chooses to allow students to receive credit, then they can also require that the courses satisfy specific criteria. Establishing these criteria does not unconstitutionally entangle the state with religion. Whether or not a school grants credit to students, however, is ultimately entirely within the school board's discretion. To find out about your school district, consult the school board's policy on "release time" programs.

XI. Accommodations for religious students in public postsecondary institutions

"Each public postsecondary educational institution shall adopt a policy which reasonably accommodates the religious observance, practice, and belief of individual students in regard to admissions, class attendance, and the scheduling of examinations and work assignments. Each policy shall include a grievance procedure by which a student who believes that he or she has been unreasonably denied an educational benefit due to his or her religious belief or practices may seek redress. Such policy shall be made known to faculty and students annually in inclusion in the

[107] *Moss v. Spartanburg County Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012); https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-public-schools/released-time/.
[108] *Moss v. Spartanburg County Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012); *Lanner v. Wimmer*, 662 F.2d 1349, 1361-62 (10th Cir. 1981).

institution's handbook, manual, or other similar document regularly provided to faculty and students."[109]

PART II: PARENTS' RIGHTS

I. Constitutional rights of parents under the U.S. Constitution and Florida Constitution

The Fourteenth Amendment to the U.S. Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[110] The U.S. Supreme Court has recognized that the Due Process Clause guarantees more than simply fair process. The Due Process Clause contains an additional component that provides a heightened level of protection against any government interference when certain fundamental rights and liberty interests are involved. In *Troxel v. Granville*, a case to determine the scope of grandparent visitation rights when pitted against a parent's rights, the Court noted that the Fourteenth Amendment "liberty interest" at issue – the interest that parents had in the care, custody, and control over their children – was perhaps the oldest of any fundamental liberty interest that the Court had recognized.[111]

The Court reflected back to a 1923 decision, when it determined that the "liberty" interest protected by the Due Process Clause included the right of parents to "establish a home and bring up children" and "to control the education of their own."[112] The Court also noted as early as 1925 that a child was not simply the creature of the State and that the people who nurture the child and direct the child's destiny have the right, and the high duty, to recognize and prepare the child for additional obligations.[113] In 1944, the Court affirmed the right of parents to direct the

[109] F.S. § 1006.53.
[110] U.S. Const. Amend. XIV.
[111] *Troxel v. Granville*, 530 U.S. 57 (2000).
[112] *Id.* at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).
[113] *Id.* at 65 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925)).

upbringing of their children when it stated: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[114] Finally, in recounting the history of parental authority in 1979, the Court stated, "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."[115]

Similarly, the Florida Supreme Court has determined that the fundamental liberty interest in parenting one's child "is protected by both the Florida and federal constitutions. In Florida, it is specifically protected by our privacy provision."[116] The Court also noted that the state constitutional privacy provision contained in article I, section 23 affords greater protection than that of the federal constitution. The standard of review that must be used to evaluate whether a state has intruded into a citizen's private life is the "compelling state interest standard."[117] Under that test, the burden of proof is on the state to justify its intrusion on privacy.[118] The burden can be met by the state if it demonstrates that the regulation being challenged serves a compelling state interest and the regulation accomplishes its goal by using the least intrusive means.[119]

II. Access to student records and information

A. FERPA and F.S. § 1002.22

The rights of students and their parents with respect to education records, created, maintained, or used by public educational institutions and agencies are protected under federal and state law.[120] The major federal law covering the privacy of

[114] *Id.* at 65-66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).
[115] *Id.* at 66 (quoting *Parham v. J.R.* 442 U.S. 584, 602 (1979)).
[116] *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996).
[117] *Winfield v. Div. of Pari-Mutual Wagering*, 477 So. 2d 544, 548 (Fla. 1985).
[118] *Id.*
[119] *Id.*
[120] Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g); F.S. § 1002.22.

student records is the Family Educational Rights and Privacy Act, 20 U.S.C. 1232(g), more commonly known as FERPA. The regulations implementing FERPA are 34 C.F.R. Part 99. Florida's student records law is F.S. § 1022.22. The rule implementing that statute is Fla. Admin. Code R. 6A-1.0955. Both FERPA and the Florida Statute describe obligations that school districts, state education agencies, and others acting for those entities have regarding the collection, processing, maintenance, quality, and disclosure of the information routinely collected and maintained. All education records about students, whether handwritten or computerized, are protected by the same regulations. These laws apply to public postsecondary institutions as well.[121]

The Florida law refers to FERPA as to how a school district must handle parent or legal guardian requests for either student education records or amendments to the student school records after reviewing them.[122] Collectively, these laws give students and parents the right to:

1. Access students' education records, including the right to inspect and review those records.[123]

2. Waive their access to the students' education records in certain circumstances.[124]

3. Challenge the content of education records to ensure that the records are not inaccurate, misleading, or otherwise a violation of privacy or other rights.[125]

4. Of privacy with respect to such records and reports.[126]

[121] F.S. § 1002.225.
[122] F.S. § 1002.22(2).
[123] F.S. § 1002.22(2)(a).
[124] F.S. § 1002.22(2)(b).
[125] F.S. § 1002.22(2)(c).
[126] F.S. § 1002.22(2)(d).

5. Receive annual notice of their rights with respect to education records.[127]

Education records, as defined by FERPA, and the federal regulations issued pursuant thereto, are confidential and exempt from F.S. § 119.07(1) and Art. I § 24(a) of the Florida Constitution.[128] An agency or institution may not release education records without the written consent of the student or parent to any individual, agency, or organization, except in accordance with and as permitted by FERPA.[129] One exception is for certain law enforcement purposes.[130]

B. Other Florida Laws

Other Florida laws give a parent of a K-12 student the right to:[131]

1. Receive accurate and timely information regarding the student's academic progress and must be informed of ways a parent can help a student succeed in school.[132]

2. Receive report cards on a regular basis that clearly depict and grade the student's academic performance in each class or course, the student's conduct, and the student's attendance.[133]

3. Receive reports at regular intervals of the academic progress and other needed information regarding the student.

4. Receive timely notification of any verified report of a substance abuse violation by the student.[134]

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[127] F.S. § 1002.22(2)(e).
[128] F.S. § 1002.221(1).
[129] F.S. § 1002.221(2)(b).
[130] F.S. § 1002.221(2)(c).
[131] F.S. § 1002.20; F.S. § 1002.22(2); F.S. § 1006.28.
[132] F.S. §§ 1002.23 and 1003.21.
[133] F.S. § 1002.20(14).
[134] F.S. § 1002.20(3)(g).

5. Access information relating to the school district's policies for promotion or retention, including high school graduation requirements.[135]
6. Access information relating to student eligibility to participate in extra-curricular activities.[136]

7. Access information relating to the state public education system, standards, and requirements.[137]

8. Access, review, object to, and challenge instructional and supplemental education materials.[138]

C. Other Federal Laws

A number of other federal laws govern education records maintained by schools, districts, and state education agencies:

1. The Individuals with Disabilities Education Act (IDEA),[139] which applies to the education records covered by this law. However, IDEA release and disclosure requirements are substantially identical to those in FERPA.

2. The Health Insurance Portability and Accountability Act (HIPAA) of 1996 (104 P.L. 191), which provides privacy regulations to protect patients by limiting the ways that health plans, pharmacies, hospitals, and other covered entities can use patients' personal medical information. The Privacy Rule of the law, however, provides a broad exemption for personal health information maintained in education records, which is protected under FERPA.

3. The Drug and Alcohol Patient Records Confidentiality Law (42 CFR Part 2), which applies to the services and treatment of records belonging to students who receive assistance from

[135] F.S. § 1008.25.
[136] F.S. § 1006.195(1).
[137] F.S. § 1002.23.
[138] F.S. § 1002.20(19) and 1006.28.
[139] 20 U.S.C. § 1400 et seq.

programs administered by the Substance Abuse and Mental Health Services Administration.

4. The Richard B. Russell National School Lunch Act (NSLA) (79 P.L. 396), which restricts the release of eligibility and services information about students and families who participate in the federal free and reduced-price lunch program.

5. The Protection of Pupil Rights Amendment (discussed below).

PART III: EXEMPTIONS

I. Parents may opt their children out of venereal disease education, but not from all types of health education.

Florida public schools are required to teach comprehensive ***health*** education.[140] Comprehensive health education ***may*** include instruction in acquired immune deficiency syndrome ("AIDS").[141] Comprehensive health education ***must*** teach the consequences of teen pregnancy and the benefits of monogamous marriage; ***must*** emphasize abstinence as the expected social standard; and ***must*** be appropriate for the grade and age of the student.[142] However, "course descriptions of comprehensive health education shall not interfere with the local determination of appropriate curriculum, which reflects local values and concerns."[143] Thus, Florida comprehensive health education law requires an emphasis on abstinence and defers to local values.

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[140] F.S. § 1003.42(2)(n): "[Public schools shall teach] [c]omprehensive health education that addresses concepts of community health; consumer health; environmental health; family life, including an awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy; mental and emotional health; injury prevention and safety; Internet safety; nutrition; personal health; prevention and control of disease; and substance use and abuse. The health education curriculum for students in grades 7 through 12 shall include a teen dating violence and abuse component that includes, but is not limited to, the definition of dating violence and abuse, the warning signs of dating violence and abusive behavior, the characteristics of healthy relationships, measures to prevent and stop dating violence and abuse, and community resources available to victims of dating violence and abuse."

[141] F.S. § 1003.46(1).

[142] F.S. § 1003.42(2)(n); F.S. § 1003.46(2).

[143] F.S. § 1003.42(3).

Comprehensive health education ***may – but need not –*** include ***sex*** education.[144] Sex education is bound by the same restrictions which bind all comprehensive health education, meaning that school districts may conform the curriculum to the values and concerns of the local community as well as the needs of the students.[145] There is one important exception: Sex education need not be comprehensive.[146] Examples of sex education which a school district may provide are abstinence-only, abstinence-plus, and comprehensive sexual health education instruction.[147] The website of the Florida Department of Health includes links to actual sex education plans adopted by select school board districts.[148]

Students ***must*** be exempted from the teaching of "reproductive health or any disease, including HIV/AIDS, its symptoms, development, and treatment" upon the written request by a parent to the school principal.[149] An exempted student "may not be penalized by reason of that exemption."[150] Note that the exemption ***does not apply to all types of comprehensive health education,*** but only to education concerning reproductive health and diseases. Conceivably, this exemption covers sex education.

II. Parents may opt their K-12 children out of health examinations and immunizations.

[144] No Florida law explicitly says this. However, no Florida law requires sex education. Furthermore, F.S. § 1003.46(2) contemplates that sex education is optional: "Throughout instruction in acquired immune deficiency syndrome, sexually transmitted diseases, or health education, ***when such instruction and course material contains instruction in human sexuality,*** a school shall…" (Emphasis required). So does the Florida Department of Education: http://www.fldoe.org/schools/healthy-schools/sexual-edu/policies.stml.
[145] F.S. § 1003.42(2)(n); F.S. § 1003.46(2).
[146] http://www.fldoe.org/schools/healthy-schools/sexual-edu/policies.stml.
[147] *Id.*
[148] *Id.*
[149] F.S. § 1003.42(3).
[150] *Id.*

Any child attending a public or private K-12 school shall be exempt from the requirement of a school-entry health examination (described in F.S. §1003.22(1)) upon written request from the parent stating objections on religious grounds.[151]

Any child attending a K-12 public or private school shall be exempt from the school immunization requirements if "[t]he parent of the child objects in writing [to the Florida Department of Health] that the administration of immunizing agents conflicts with the parent's religious tenets or practices."[152] In the writing, the parent must identify the immunization(s) to which he or she objects. Additionally, the parent must complete and attach Florida Department of Health ("Department") Form 681.[153] The Department is prohibited from inquiring into whether the parent's statement of religious objection is in good faith.[154] Furthermore, the Department may not require the parent to obtain a letter from a clergy member, as "a certificate from a cleric that immunization would conflict with the parent's or guardian's religious beliefs" would be a prohibited inquiry into the good faith of the parent's religious beliefs.[155] There are four other, non-religious grounds for exempting one's child from an immunization requirement.[156]

III. Immunization exemptions may be available in postsecondary institutions of education.

The rules for immunization exemptions are fewer and further between than they are for K-12 schools. It seems that postsecondary institutions have almost complete control over their immunization requirements.

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[151] F.S. §1003.22(1); F.S. § 1020.20(3)(a).
[152] F.S. § 1003.22(5)(a).
[153] Fla. Admin. Code R. 64D-3.046(1)(a)(2). Form 681 is found at https://www.flrules.org/Gateway/reference.asp?No=Ref-02341.
[154] *Flynn v. Estevez*, 221 So. 3d 1241, 1244 (Fla. 1st DCA 2017); *Dep't of Health v. Curry*, 722 So. 2d 874, 877-78 (Fla. 1st DCA 1998).
[155] *Curry*, supra n. 22 at 878.
[156] F.S. § 1003.22(5)(b)-(e).

First, the only government-mandated immunizations for any postsecondary institutions are found in F.S. § 1006.69. That statute applies only to public postsecondary institutions. It mandates that an enrolled individual who will be residing in on-campus housing shall provide documentation of vaccinations against meningococcal meningitis and hepatitis B unless the individual or the individual's parents (if the individual is a minor) declines the vaccinations by signing a separate waiver for each of these vaccines, provided by the institution, acknowledging receipt and review of the information provided. The institution must provide the student or (if the student is a minor) the student's parent detailed information about vaccines which amounts to informed consent. ***Other than that, vaccination requirements are established and implemented by each postsecondary institution.***

Concerning immunization exemptions: It remains to be seen whether other laws require public postsecondary institutions to establish religion-based immunization exemptions. The laws governing religion-based discrimination in ***public*** education are Title IV of the Civil Rights Act of 1964 (42 U.S.C. § 2000c et. seq.), the Florida Educational Equity Act ("FEEA") (F.S. § 1000.05), and the Florida Religious Freedom Restoration Act ("FRFRA") (F.S. Ch. 761). The first two statutes prohibit discrimination based on religion in ***public*** education, while FRFRA prohibits ***government*** from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability," unless the government shows that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest.[157] None of these statutes have been applied in the context of religious exemptions to immunization requirements.

No statute requires private postsecondary institutions to establish immunization exemptions.

[157] F.S. § 761.03.

IV. Parents may exempt their K-12 children from Florida's immunization registry.

Using a written notice to the Florida Department of Health, a parent may exempt his or her K-12 child from inclusion in the Florida immunization registry, Florida SHOTS.[158] The parent must submit a Florida SHOTS Notification and Opt-out Form to the Department, either in English (DH Form 1478), Spanish (DH Form 1478S), or Haitian-Creole (DH Form 1478H). These forms are available from the Department of Health, Bureau of Immunization, 4052 Bald Cypress Way, Bin #A-11, Tallahassee, FL 32399-1719. "The immunization records of children whose parents choose to opt-out will not be shared with other entities that are allowed by law to have access to the children's immunization record via authorized access to Florida SHOTS."[159]

V. Parents may exempt their K-12 children from receiving contraceptives.

"District school board personnel shall not refer [K-12 public school] students to or offer students at school facilities contraceptive services without the consent of a parent or legal guardian. To the extent that this subsection conflicts with any provision of chapter 381, the provisions of chapter 381 control."[160] The only portion of chapter 381 of the Florida Statutes which addresses contraceptives is F.S. § 381.0051, known as the "Comprehensive Family Planning Act." Under that act, it is arguably possible for district school board personnel working under the Department of Health to lead K-12 public school students to contraceptives, such as by providing pregnant minors with contraceptives in certain circumstances under F.S. § 381.0051(4)(a).

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[158] Fla. Admin. Code R. 64D-3.046(6).
[159] *Id.*
[160] F.S. § 1006.062(7); F.S. § 1020.20(3)(e).

VI. Tests, questionnaires, or surveys on pupil health behaviors and risks

A. Florida Law

No educational agency or institution may collect, obtain, or retain information on the political affiliation, voting history, religious affiliation, or biometric information of a student, parent, or sibling of the student.[161] "For purposes of this subsection, the term 'biometric information' means information collected from the electronic measurement or evaluation of any physical or behavioral characteristics that are attributable to a single person, including fingerprint characteristics, hand characteristics, eye characteristics, vocal characteristics, and any other physical characteristics used for the purpose of electronically identifying that person with a high degree of certainty. Examples of biometric information include, but are not limited to, a fingerprint or hand scan, a retina or iris scan, a voice print, or a facial geometry scan."[162]

Unfortunately, the reach of this law is limited. The Florida Department of Health – in conjunction with the federal Centers for Disease Control and Prevention, the Florida Department of Education, local school board districts, and other agencies – conducts a series of random, anonymous, school-based surveys of risk behaviors among public school students. First, a random sample of public schools is selected for participation in the survey. Second, within each selected school, a random sample of classrooms is selected, and all students in those classes are invited to participate in the survey. Student participation in these surveys is voluntary. The surveys are:

1. **Middle School Health Behavior Survey (MSBS):** "[S]tatewide, school-based confidential survey of Florida's public middle school students."[163] The topics covered are: (1) Demographic information (age, gender, grade, race/ethnicity,

[161] F.S. § 1002.222(1)(a).
[162] *Id.*
[163] http://www.floridahealth.gov/statistics-and-data/survey-data/florida-youth-survey/middle-school-health-behavior-survey/index.html.

weight, height); (2) Unintentional injuries and violence; (3) Tobacco use; (4) Alcohol and other drug use; (5) Dietary behaviors; and (6) Physical Activity. There is no Florida statute authorizing this survey to be found.

2. **Youth Risk Behavior Survey (YRBS):** "[S]tatewide, school-based confidential survey of Florida's public high school students."[164] The topics covered are: (1) Demographic information (age, gender, grade, race/ethnicity, weight, height); (2) Unintentional injuries and violence; (3) Tobacco use; (4) Alcohol and other drug use; (5) Sexual behaviors; (6) Dietary behaviors; and (7) Physical Activity. There is no Florida statute authorizing this survey to be found.

3. **Florida Youth Tobacco Survey (FYTS)**: "Tracks indicators of tobacco use and exposure to secondhand smoke among Florida public middle and high school students…" It is done as part of the comprehensive statewide tobacco education program established in F.S. § 381.84.[165]

4. **Florida Youth Substance Abuse Survey (FYSAS)**: It is a "collaborative effort" between numerous Florida departments which asses "risk and protective factors for substance abuse, in addition to substance abuse prevalence."[166] The target population are Florida's public middle and high school students. It is administered along with the FYTS as part of the comprehensive statewide tobacco education program established in F.S. § 381.84.

[164] http://www.floridahealth.gov/statistics-and-data/survey-data/florida-youth-survey/youth-risk-behavior-survey/index.html.
[165] http://www.floridahealth.gov/statistics-and-data/survey-data/florida-youth-survey/florida-youth-tobacco-survey/index.html.
[166] http://www.floridahealth.gov/statistics-and-data/survey-data/florida-youth-survey/florida-youth-substance-abuse-survey/index.html; https://www.myflfamilies.com/service-programs/samh/prevention/fysas/.

B. Federal Law

Under the Protection of Pupil Rights Amendment ("PPRA")[167] and 34 CFR § 98.1 et seq., no student shall be required to submit a survey, analysis, or evaluation funded or administered by the U.S. Department of Education that reveals the following information (unless an exception in 20 U.S.C. § 1232h(c)(4) applies) without the prior consent of the student (if the student is an adult or emancipated minor) or without the prior written consent of the parent (if the student is an unemancipated minor):

> 1. Political affiliations or beliefs of the student or the student's parent;
> 2. Mental or psychological problems of the student or the student's family;
> 3. Sex behavior or attitudes;
> 4. Illegal, anti-social, self-incriminating, or demeaning behavior;
> 5. Critical appraisals of other individuals with whom respondents have close family relationships;
> 6. Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
> 7. Religious practices, affiliations, or beliefs of the student or the student's parent; and
> 8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).[168]

Furthermore, pursuant to the PPRA, no student shall be required to participate in the following *activities* funded or administered by the U.S. Department of Educations without prior

[167] 20 U.S.C. §1232h.
[168] 20 U.S.C. § 1232h(b); 34 CFR § 98.1 et seq. (clarifying that the PPRA applies only to programs funded or administered by the U.S. Department of Education).

notification from the local educational agency (unless an exception in 20 U.S.C. § 1232h(c)(4) applies):

1. Activities involving the collection, disclosure, or use of personal information for the purpose of marketing or for selling that information (or otherwise providing that information to others for that purpose); and
2. Any nonemergency, invasive physical examination or screening that is:
   a. required as a condition of attendance;
   b. administered by the school and scheduled by the school in advance; and
   c. not necessary to protect the immediate health and safety of the student, or of other students.[169]

The term "invasive physical examination" means any medical examination that involves the exposure of private body parts, or any act during such examination that includes incision, insertion, or injection into the body, but does not include a hearing, vision, or scoliosis screening.[170]

VII. Parents may exempt their K-12 children from certain biological experiments.

Some parents may object to certain biological experiments on religious or other grounds. Any child attending a public or private K-12 school shall be exempt from performing the following biological experiments upon written request of the parent.[171] The written request need not cite a religious motivation:

1. Participation in surgery or dissection activities on nonliving mammals or birds.[172]

[169] 20 U.S.C. § 1232h(c)(2)(B)-(C).
[170] 20 U.S.C. § 1232h(c)(6)(B).
[171] F.S. § 1003.47(1); F.S. § 1020.20(3)(c).
[172] F.S. § 1003.47(1)(a).

2. Biological experiments on nonmammalian vertebrates.[173]

3. Anatomical studies of any animal (if an anatomical model is used).[174]

4. Anatomical studies of nonliving nonmammalian vertebrates (if no anatomical model is used).[175]

VIII. The Pledge of Allegiance, The Declaration of Independence, and the National Anthem

A public school student must be excused from reciting the pledge of allegiance and the Declaration of Independence upon written request by the student's parent.[176] A public school cannot require an excused student to even stand at attention or put a hand over his or her heart when the pledge of allegiance is read.[177] No public school student may be forced to participate in the national anthem.[178]

IX. Athletics

Students must satisfactorily pass a medical evaluation each year before participating in athletics, unless the parent objects in writing based on religious tenets or practices.[179]

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[173] F.S. § 1003.47(1)(c).
[174] *Id.*
[175] *Id.*
[176] F.S. § 1003.44(1); 1002.20(12); F.S. § 1003.421(4).
[177] F.S. § 1003.44(1); *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008).
[178] *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[179] F.S. § 1002.20(17)(b); F.S. § 1006.20(2)(a), (d).

CONCLUSION

We would like to thank you for your time and attention to this booklet. If you have any questions, or would like to request additional copies, please contact the Pacific Justice Institute. If you would like to inquire about legal advice or assistance with one of the issues discussed in this booklet, contact the legal department of the Pacific Justice Institute for more information.