



Public Education: Religious Rights and Values in Nevada Schools

Pacific Justice Institute

PROTECTING FAITH, FAMILY, AND FREEDOM

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

We at the Pacific Justice Institute are 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 so-called “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 about fourteen critical issues confronting public education today. From Bible clubs to sex education, 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 inquire about receiving legal assistance, please do not hesitate to contact the Pacific Justice Institute toll free at 888-305-9129.

Sincerely,


Brad Dacus, President

I. Students have a right to start Bible, Christian, or other faith-based clubs on campus

We are aware that many school administrators fear that allowing a Christian or other faith-based club on campus violates the “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 United States Supreme Court has never insisted that there be an impenetrable wall between church and state.¹ Indeed, the Court has never thought it was necessary, desirable, or even possible to enforce a government regime of total separation in order to comply with the First Amendment’s Establishment Clause.²

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.”³ As a matter of law, the Constitution “affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any.”⁴ Therefore, limiting the existence or religious expression of a Christian club based on a fear of violating “the separation of church and state” is clearly mislaid. Indeed, prohibiting Christian

¹ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense.”).

² *Id.* See also, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

³ *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984).

⁴ *Id.* (citations omitted) (emphasis added).

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

Over thirty years ago, the Supreme Court decided *Tinker v. Des Moines School District*. This case involved several students who had been 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 Supreme Court confirmed.⁵ 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.”⁶

Religious speech falls within the scope of the *Tinker* case’s protection. 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.”⁷ Indeed, 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.⁸ Such discrimination

⁵ *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969).

⁶ *Id.* at 511.

⁷ *Capitol Square Review v. Pinette*, 515 U.S. 753, 760 (1995).

⁸ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Unions Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty Schs v. Mergens*, 496 U. S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

necessarily amounts to an unconstitutional act of state sponsored hostility toward religion.⁹ 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 allowing a public school to prohibit student religious expression on campus during non-instructional hours.¹⁰

In addition to being constitutionally protected, the right of students to meet on campus during non-instructional school hours is protected by the federal Equal Access Act.¹¹ The Equal Access Act generally provides that:

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.¹²

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

⁹ See, generally, *Lynch*, 465 U.S. 668 (1984).

¹⁰ See, e.g., *Tinker*, *supra* n. 6, 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 point of view.” (emphasis added).

¹¹ 98 Stat. 1302, 20 U.S.C. § 4071 (2004).

¹² *Id.* at § 4071(a).

Within the context of the Equal Access Act, the Supreme Court has defined a “non-curriculum student group” as “any student group that does not directly relate to the body of courses offered by the school.”¹³ More specifically, the Court explained that:

...a student group directly relates to a school’s curriculum (1) if the subject matter of the group is actually taught, or will soon 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.¹⁴

Applying these criteria, the Supreme Court has summarily rejected the assertion that certain student groups like the Chess Club and National Honor Society were curriculum related, while a Christian Bible Club was not. Simply because particular student clubs might advance the “overall goal of developing effective citizens...enable students to develop lifelong recreational interests...[and] enhance students’ abilities to engage in critical thought processes,” does not, the Supreme Court held, make them sufficiently related to a school’s curriculum so that application of the Equal Access Act may be avoided.¹⁵

¹³ *Bd. of Educ. of Westside Cmty. Schs.*, 496 U.S. 226, 239-40 (1990).

¹⁴ *Id.* (numbering (1), (2), (3), (4) added).

¹⁵ *Id.* at 244; [See, also, *Van Schoick v. Saddleback Valley Unified Sch. Dist.*, 87 Cal. App. 4th 522, 529 (2001)].

Based upon these criteria, student groups and clubs like Key Club, Honor Society, and Student Council are considered non-curriculum related.¹⁶ If even one such non-curriculum related group like these is allowed to meet on campus during non-instructional school hours, the school is under a legal obligation to afford the same, or similar, accommodations to a Bible/Christian club.¹⁷ Such an accommodation cannot be legally denied.

II. Students can share their faith on campus

The Supreme Court has ruled that student speech is constitutionally protected by the First Amendment as long as the speech is not a material or substantial disruption.¹⁸ This means that when students are outside of class, they can share their faith with friends or other students. Student speech can only be restricted when it substantially interferes with school discipline.¹⁹ Interference, however, does not include some students finding the speech

¹⁶ See, e.g., *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1252 (3rd Cir. 1993) (finding that historical/humanitarian subject matter of community service clubs, like the Key Club, is insufficient to make them curriculum related groups); *Van Schoick*, *supra*, at 530 (holding that a school district requiring eight hours of community service for graduation does not make student community service groups like the Key Club or Girls League curriculum related.)

¹⁷ *Bd. of Educ. of Westside Cmty. Schs.*, 496 U.S. at 236 (“Thus even if a public secondary school allows only one “noncurriculum related student group” to meet, the [Equal Protection] Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.”).

¹⁸ *Tinker*, *supra* n. 6, 393 U.S. 503.

¹⁹ *Id.* at 508-09.

offensive; mere discomfort at the subject matter is not sufficient to restrict student speech.²⁰

A. Right to use evangelistic material when sharing faith

It is generally recognized that high school students can distribute religious materials containing Bible verses.²¹ Students can also use religious tracts when they share their faith because tracts and other evangelistic materials constitute constitutionally protected speech.²² As such, the First Amendment protects a student's right to distribute religious materials on campus.²³ 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."²⁴

²⁰ *Id.* at 509.

²¹ *Rivera v. E. Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989).

²² *Heffron v. Int'l Soc'y of Krishna Consciousness*, 452 U.S. 640 (1981); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Cf. Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

²³ *Rivera*, *supra* n. 21, 721 F. Supp. 1189; *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987); *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989); *Henry v. Sch. Bd. of Colorado Springs Sch. Dist. 11*, 760 F. Supp. 856 (D. Colo. 1991). *See also Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993) (overturning discriminatory ban on student distribution of religious literature).

²⁴ *Rivera*, *supra* n. 21, 721 F. Supp. 1189 (D. Colo. 1989).

In fact, a school cannot even require students to give advance notice when they plan to pass out religious tracts.²⁵ Schools also lack the power to restrict students to a certain area when passing out religious tracts, unless the students are disrupting school discipline.²⁶

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

Because public schools are agencies of the government, they may not impose overly broad or arbitrary speech regulations on students. If a school allows any student to speak publicly on campus about non-curriculum issues, the school cannot prohibit another student from speaking about religion; such a restriction would violate the student's First Amendment rights.²⁷ Similarly, if a school allows any club to put on skits or lunchtime presentations, then the school must also allow students to put on religious skits or lunchtime presentations.

²⁵ *Thomas v. Collins*, 322 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).

²⁶ *Johnston-Loehmer v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994).

²⁷ See, e.g., *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..."); *Rosenberger v. Rectors and the Univ. of Virginia*, 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.").

III. Students can pray on campus

A student on a public school campus has the right to engage in personal prayer.²⁸ A student also has the right to engage in *public prayer*, contrary to popular belief. Moreover, students can gather and pray on school property before the school day officially begins.²⁹ High school students have the right to engage in voluntary group prayer, and elementary students can participate in group prayer with parental consent.³⁰ Schools, therefore, cannot deprive students of this right by refusing to allow student organized meetings.³¹ “See You at the Pole” is an example of a constitutionally protected, student-led, student-initiated prayer movement held annually on a national scale.

A. Personal Prayer at Public School

The right to engage in personal prayer in a public place is guaranteed by the Free Exercise Clause of the First Amendment. The Constitution does not “prohibit any public school student from voluntarily praying at any time before, during, or after the school day.”³² Thus a student is free to bow his head and pray over his food at lunch, before a test, or during free time (such as study hall or recess).

²⁸ *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

²⁹ *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 589-90 (N.D. Miss. 1996).

³⁰ *Id.*

³¹ *Daugherty v. Vanguard Charter Acad.*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000).

³² *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313 (2000).

In Nevada, the Nevada Revised Statutes (“NRS”) specifically require that “[e]very school district shall set aside a period at the beginning of each school day, during which all persons must be silent, for voluntary individual meditation, prayer or reflection by pupils.”³³ Students not only have a constitutional right to engage in personal prayer in public school, but the NRS mandates a period of silence at the start of each school day that may include personal prayer.³⁴

B. Student-Initiated Group Prayer at Public School

The Constitution’s protection of personal prayer in school extends beyond silent prayer. Prayer that is spoken aloud or occurs in front of others is also protected by the

³³ NRS § 388.075. *See, Wiideman v. McKay*, 132 F.R.D. 62 (D. Nev. 1990) (dismissing on jurisdiction grounds the only court case to challenge to NRS § 388.075 for lack of standing); *Sherman v. Koch*, 623 F.3d 501, 516, n6. (7th Cir. 2010) (citing NRS § 388.075 as an example of a constitutional state statute and consistent with *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997)) because “the Eleventh Circuit in *Bown* ...did not hold that a moment of silence law would fail the *Lemon* test if the law included prayer as a permissible activity. And we find nothing wrong with Illinois’ (or Virginia’s or Texas’) Legislature informing teachers and students alike that students may pray during the period of silence, given that the statutory language does not indicate any preference for prayer over silent reflection.”).

³⁴ In addition to Nevada, eight other states have moment of silence laws that specifically include “prayer”: Florida, Kansas, Louisiana, Nevada, North Dakota, Ohio, Pennsylvania, and West Virginia. *See*, Fla. Stat. § 1003.45; Kans. Stat. § 72-5308a; La. Stat., Tit. 17, Ch. 10, Part II, Subpart B, § 2115; N.D. Cent. Code, § 15.1-19-03.1; Ohio Rev. Code, § 3313.601; Penn. Stat., Tit. 24, Ch. 1, § 15-1516.1; W.Va. Const., Art. III, § 15a.

First Amendment.³⁵ In order for a prayer to be considered private speech and therefore protected by the Constitution, it must be genuinely student-initiated and voluntary.³⁶ A prayer can be spoken aloud among a group of students as long as it does not “materially disrupt” the learning environment.³⁷ These private, vocal prayers can occur in the midst of an audience assembled for some other purpose.³⁸ For example, an individual student or a group of students can pray aloud during a school sporting event provided that the prayer does not materially disrupt the operation of the school.

In summary, vocal or silent prayer that is initiated by students and does not have the appearance of school endorsement is protected by the Constitution.

IV. Students can take their Bibles to school

A. Taking a Bible to school for use during non-curricular time

In *Breen v Runkel*,³⁹ a federal court upheld the constitutionality of the activities of public school students who attended lunchtime Bible meetings. These Bible studies occurred during a non-curricular part of the school day (lunchtime) and did not disrupt the educational environment or infringe on the rights of fellow students. If students are allowed to attend such lunchtime Bible

³⁵ *Chandler, supra* 230 F.3d at 1317.

³⁶ *Id.*

³⁷ *Tinker, supra* n. 6., 393 U.S. at 509.

³⁸ *Chandler, supra* 230 F.3d at 1317.

³⁹ *Breen v. Runkel*, 614 F. Supp. 355 (W.D. Mich. 1985).

meetings, then they must also be allowed to take a Bible to school and read it during other non-curricular times of the day (recess, free time, etc.).

The First Amendment of the Constitution ensures the right to free speech, which includes the right of religious expression.⁴⁰ Moreover, the Supreme Court requires that school officials recognize students' constitutional rights in the school setting.⁴¹ The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.⁴² As a result, students are entitled to freely express their religious views by reading their Bible during the school day, insofar as students' decision to read the Bible in school is an expression of their religious freedom.

In order for a school to prohibit a student from reading the Bible during non-curricular time, the school must show that the restriction was motivated by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁴³ The school must show that the student's reading of the Bible "materially and substantially interferes" with the operation of the school or invades the rights of others.⁴⁴ Absent such a showing, a student has the constitutionally protected right to read the Bible at school during any non-curricular time.⁴⁵

⁴⁰ *Widmar*, *supra* n. 9, 454 U.S. at 269.

⁴¹ *Tinker*, *supra* n. 6, 393 U.S. at 506.

⁴² *Id.* at 512-13.

⁴³ *Id.* at 509.

⁴⁴ *Id.*

⁴⁵ *Id.*

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

If the student's personal Bible reading occurs during class or other curricular times, 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."⁴⁶ Thus, the school is able to exercise some discretion in order to avoid the appearance that it is endorsing a particular religion.⁴⁷

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 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

⁴⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

⁴⁷ *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990).

allowing all other literature.⁴⁸ Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.⁴⁹

Discriminatory policies by schools which prevent a student from reading the Bible would also infringe 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.⁵⁰ In the absence of such a compelling interest, the school cannot restrict a student's personal Bible reading, even during a silent reading period.

In addition, school officials cannot entirely ban study of the Bible from public school curriculum. For example, the Bible can be part of a public school course as long as it is taught from a secular, educational point of view.⁵¹ Courts have also held that the Bible has a legitimate place in public school libraries.⁵²

V. Students can write papers and speak on Christian topics as class assignments

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

⁴⁸ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

⁴⁹ *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).

⁵⁰ *Widmar*, *supra* n. 9, 454 U.S. at 269-70.

⁵¹ *Stone v. Graham*, 449 U.S. 39, 42 (1980).

⁵² *Roberts v. Madigan*, 702 F. Supp. 1505, 1512 (D. Colo. 1989).

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content 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 content.⁵³

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.

VI. School facilities can be used for religious purposes outside of school hours

If a school allows any outside groups to use school grounds, then the school must also allow religious groups to use the campus. In a case that went before the Supreme

⁵³ See Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools (Feb. 7, 2003). Found at www.ed.gov, this guidance 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. Dated February 7, 2003.

Court, 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.”⁵⁴ Even though the Supreme Court felt the content was “quintessentially religious” and “decidedly religious in nature,” it still held that the religious speech could not be excluded.⁵⁵ The school defended its policy by claiming that allowing a religious group on school grounds violated the Establishment Clause. The Supreme Court, however, 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.”⁵⁶

This school also contended that because they had elementary school children on campus, they had a higher duty to protect impressionable young children from a perceived government endorsement of religion. The Supreme 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.”⁵⁷ The Supreme 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.⁵⁸

⁵⁴ *Good News Club*, 533 U.S. 103.

⁵⁵ *Id.* at 111.

⁵⁶ *Id.* at 114 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)).

⁵⁷ *Id.* at 115.

⁵⁸ *Id.* at 118.

In another Supreme Court case, a private religious group wanted to use school grounds to present religious films.⁵⁹ The Supreme 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.⁶⁰ Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.⁶¹ If the school passes out flyers for secular activities then it cannot refuse to pass out similar flyers for religious events.⁶²

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.

In 1993, the State Attorney General of Nevada issued an opinion directly confirming that religious groups may use public school facilities outside of normal school hours when the school has created a limited public forum.⁶³ In this opinion, the State Attorney General reversed a prior opinion that such use of school facilities violated the Nevada Constitution.⁶⁴ The State Attorney General was addressing two specific sections in the Nevada Constitution

⁵⁹ *Lamb's Chapel*, *supra* n. 9., 508 U.S. 384 (1993).

⁶⁰ *Id.*

⁶¹ *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir. 2003).

⁶² *Id.*

⁶³ Op. Nev. Att'y Gen. No. 93-2 (Mar. 16, 1993) (reversing Op. Nev. Att'y Gen. No. 316 (Feb. 19, 1954) ("The Nevada Constitution does not prohibit the use of a school facility by sectarian groups for occasional worship services outside of normal school hours if the school board of trustees has created a limited public forum and the cost associated with the use is reimbursed to the school district.")).

⁶⁴ *Id.*

that prohibit (1) any “sectarian instruction”⁶⁵ in any state established public school⁶⁶ and (2) the use of public funds for any sectarian purpose.⁶⁷ The State Attorney General of Nevada opined that these sections were not in conflict with NRS § 393.071, which allows that “a school trustee *may* grant the use of school buildings and grounds for meetings of literary, scientific, recreational, educational or of general public interest.”⁶⁸ The opinion notes that although this statute allows school districts to open their facilities to non-student groups, they are not required to do so.⁶⁹ But, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious events.⁷⁰

⁶⁵ Nev. Const. Art. 11 § 9.

⁶⁶ Nev. Const. Art. 11 § 2.

⁶⁷ Nev. Const. Art. 11 § 10; Op. Nev. Att’y Gen. No. 93-2 (Mar. 16, 1993) (finding that “if the use of the facility was conditioned upon a rental fee reflecting the cost to the school district for the proposed use, no public funds would be expended for the sectarian purpose.”).

⁶⁸ NRS § 393.071 (emphasis added).

⁶⁹ *Wallace v. Washoe County Sch. Dist.*, 701 F. Supp. 187, 189 (D. Nev. 1988).

⁷⁰ The Nevada courts have rarely cited Section 10 of Article 11 in the Nevada State Constitution and have never directly addressed it with respect to use of a public school facility outside of public school hours. *Schwartz v. Lopez*, 382 P.3d 886, 132 Nev. Adv. Rep. 73, 2016 Nev. LEXIS 668 (Nev. 2016); *Duncan v. Nev. ex rel. Office of the State Treasurer of Nev.*, 2016 Nev. Dist. LEXIS 1467, *1; *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 1882 Nev. LEXIS 5 (Nev. 1882). See also, David Wilhelmsen, *Orphans, Baby Blaines, and the Brave New World of State Funded Education: Why Nevada’s New Voucher Program Should Be Upheld Under Both State and Federal Law*, 42 J. Legis. 257 (2016); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope and First Amendment Concern*, 26 Harv. J.L. & Pub. Pol’y 551, 588 (2003); Jay S. Bybee and David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of the*

In addition, it is legal for students to pass out flyers about the religious event as long as advertising efforts do not disrupt class. Of course, elected officials and school employees are free to attend such services in their capacities as private citizens.

VII. Schools can acknowledge/celebrate religious holidays such as Christmas and Easter

A. Celebrating a Religious Holiday in School and the Classroom

Schools and teachers are often concerned that they will be impermissibly endorsing religion by sponsoring activities such as making Easter eggs, 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.⁷¹

The fact that a particular religious holiday has become a significant secular tradition is also a permissible reason

Religious Participation in Public Programs, 2 Nev. L.J. 551, 570 (2002).

⁷¹*Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 909 (D. N.J. 1993).

for celebrating that holiday. For example, a school Christmas musical production may include religious carols, so long as they are presented “in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.”⁷² As a general matter, any Christmas musical program should also include secular Christmas carols such as “Rudolph the Red Nosed Reindeer” or “Jingle Bells.”

Many cases have dealt with the issue of whether religious holiday symbols displayed in a classroom or school are permissible. For the last three decades, the answer has been “it depends.” The classic example is the displaying of the Nativity Scene. Displaying the Nativity Scene with religious symbols from other religions or secular symbols is constitutional because doing so acknowledges secular aspects of the holiday. For example, placing the Nativity Scene alongside the Jewish menorah, Santa Claus, or a Christmas tree would be permissible because such a display sends the secular message of inclusion and the freedom of one to choose his or her own beliefs.⁷³

Holidays are a large part of our nation’s culture and tradition and provide students an opportunity to learn about the various beliefs of different religions and ethnicities. Teachers and administrators should not completely shun recognizing those holidays out of a fear of offending non-

⁷² *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir. 1980).

⁷³ *Sechler v. State College Area Sch. Dist.*, 121 F. Supp. 2d 439 (M.D. Pa. 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).

religious students or a perceived “separation of church and state.” Finally, school administrators should offer opportunities for students who do not wish to take part in holiday celebrations to opt-out of those activities.

VIII. Parents have the right to participate in decisions relating to the education of their children

The NRS recognizes that parents have the primary responsibility for, and control over, the upbringing of their children, stating: “The liberty interest of a parent in the care, custody and management of the parent’s child is a fundamental right.”⁷⁴ However, many parents are unaware of the opportunities available to them to influence the direction and policies of their child’s school. If fully utilized, parents have the power to achieve what lawsuits and courts cannot in determining the outcome of their child’s public school education.

The opportunities given to parents may be most effectively focused directly at their child’s school and also in their school district. Parents have the right to *examine the curriculum materials*, including teacher’s manuals, films, and other supplementary materials, of the class or classes in which their child is enrolled. Parents may then meet with their child’s teacher and principal to discuss the presentation of this material to their child. Their

⁷⁴ NRS § 126.036. *See, also, Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 818 (2005) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (affirming that parents have a “fundamental interest’...in the care, custody, and control of their children.”).

examination of the curriculum and meeting with the teacher and principal extends to all subjects taught.

In October of 2010, Nevada adopted the Common Core (standards-based) education system.⁷⁵ This education model grants school districts a substantial amount of control over the manner and content of material presented to students. The Nevada Department of Education has encouraged parents to express complaints regarding Common Core directly to their student's principal, school district superintendent, and school district's board of trustees.⁷⁶ The Nevada Department of Education does not consider Common Core to be a "curriculum," as such, but a set of standards that students need to meet.⁷⁷ Curriculum is the method (textbooks, software, lesson plans, etc.) that each school district has local control over for teaching and for aligning with Nevada State Standards.⁷⁸ Each school district's board of trustees has the responsibility to approve or disapprove curriculums that are submitted to them by their school district's administrators. With respect to instructional materials, a school may only use a "basic textbook" that has been approved statewide by the Nevada State Board of Education.⁷⁹ Supplemental textbooks, however, may be purchased by a school district and used with the approval of the Superintendent of Public Instruction.⁸⁰ Thus, the Nevada educational model allows for considerable local control at the school district level,

⁷⁵ NRS § 389.195-511. *See also*, Nev. Dept. of Ed., https://ir.nevada.edu/documents/ccss/History_of_Common_Core_Standards_in_Nevada.pdf

⁷⁶ Nev. Dept. of Ed. *See* http://www.doe.nv.gov/home/FAQs/Common_Core_FAQ/.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ NRS § 389.880(1).

⁸⁰ NRS § 389.880(2)(b).

and parents can have a substantial impact through their involvement in their school district.

Parents and guardians should also take advantage of the opportunity provided by law to monitor and influence the operation of their student's school. For example, when establishing course materials on reproductive health and AIDS, the board of trustees for each school district must "appoint an advisory committee consisting of (a) Five parents of children who attend schools in the district..."⁸¹ Additionally, parents can influence school policy by running for the school board – often the most effective route to influence school policies.

In Nevada, the local school district also has significant control over the basic textbooks approved by the Nevada State Board of Education. As a matter of general practice, if a school district submits an Application for Textbook Adoption,⁸² it will likely be approved:

The textbook adoption process at the state level consists of the Nevada Department of Education submitting to the Nevada State Board of Education a compiled list of all school district selected textbooks since the last board meeting. The list typically is placed as a consent item on the board's

⁸¹ NRS § 389.036(2)(a).

⁸² A copy of the Application for Textbook Adoption and the necessary requirements for a school district is available on Nevada's Department of Education website. See http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Standards_Instructional_Support/Textbook/TextbookEvaluation.pdf.

agenda, which is usually approved without discussion.⁸³

Because there is strong evidence that once submitted, a textbook adoption application will be approved, parents' involvement in the school district can have a powerful impact on their child's education.

IX. Parents must consent to their child's attendance of any comprehensive sex education or AIDS prevention education

The NRS has established clear guidelines for school districts with respect to any course that addresses sexual education or AIDS, in order to respect parental rights and to protect students, "the most vital resource to the future of this State."⁸⁴ Teaching and learning cannot take place without the physical and mental well being of the students. Parents have a right to ensure that their child's school provides "a safe and respectful learning environment in which persons of differing beliefs...can realize their full academic and personal potential."⁸⁵

Any activity that tends to isolate particular students, subjects students to name calling and bullying, or tells students that their religious beliefs are wrong, destroys any sense of a safe and welcoming school environment. Nevada has an anti-bullying statute with respect to public

⁸³ Mitch Bishop, Katie Bliven, Katie and Scott Hess, *Nevada's Textbook Adoption Process: The State Perspective* (2007). UNLV Theses, Dissertations, Professional Papers, and Capstones. 821.

⁸⁴ NRS § 388.132(1).

⁸⁵ NRS § 388.132(6)(a).

schools⁸⁶ to ensure that every school will provide “a safe and respectful learning environment that is free of bullying and cyber-bullying.”⁸⁷ The NRS states that all administrators, teachers, and other personnel of school districts and schools must “demonstrate appropriate and professional behavior on the premises of any school by treating other persons, including, without limitation, pupils, with civility and respect...”⁸⁸ No teacher or school employee may engage in bullying, and if an employee witnesses or learns of any such behavior, the employee must report such activity on that same day.⁸⁹

The highly sensitive nature of comprehensive sex education and AIDS prevention education creates a situation that must be approached with great care by school administrators and teachers when planning curriculum or inviting guest speakers to the school. A student may not be exposed to any course on sexual education or AIDS unless the school district has first provided parents with written notice and then received written parental consent, in accordance with the NRS.⁹⁰ Additionally, such a course may only be taught by a “teacher or school nurse whose qualifications have been previously approved by the board of trustees.”⁹¹

Upon receiving notice that such a course is to be taught, parents have the right to opt their child out of comprehensive sex education classes, AIDS prevention education, and presentations made by guest speakers who

⁸⁶ NRS § 388.1352; NRS § 388.23535.

⁸⁷ NRS § 388.133.

⁸⁸ NRS § 388.132(6)(b).

⁸⁹ NRS § 388.1351(1).

⁹⁰ NRS § 389.036(4).

⁹¹ NRS § 389.036(3).

discuss these topics and issues of sexual orientation.⁹² Before making the decision to opt their child out of such classes and presentations, parents may examine the curriculum being used and meet with the instructor and principal to discuss the presentation of these topics to their child.⁹³ It is important to note that a student's *parents must opt-in to such a course* for their student in Nevada. Without written parental consent, a student cannot be exposed to such course material.

Many times when a school invites guest speakers to discuss issues like homosexuality with students, although the stated motive is to promote tolerance, the speakers themselves are intolerant of students whose religious beliefs are incompatible with a homosexual lifestyle. This intolerance has manifested itself through the use of derogatory language such as *homophobe* or *bigot*, which has the effect of isolating and publicly identifying those students whose religious beliefs do not support a homosexual lifestyle. The NRS acknowledges that a “learning environment that is safe and respectful is essential for the pupils enrolled in the schools in this State and is necessary for those pupils to achieve academic success.”⁹⁴ Any such derogatory language directed at a student of religious belief would violate Nevada's anti-bullying statute, as discussed above. The isolation created by bullying destroys the safe and supportive environment to which pupils are entitled.

⁹² NRS § 389.036(4).

⁹³ NRS § 389.036(5). *See also*, http://www.doe.nv.gov/Standards_Instructional_Support/Health_Instructional_Resources/ (providing related material at the website for the Nevada Department of Education).

⁹⁴ NRS § 388.132(2).

Parents may pre-emptively request that their student be opted-out of any such instruction at the start of the school year (see “*Opt-Out Form*” and instructions included in the center of this booklet.) Please note that a copy of the opt-out form should be *given to both the child’s teacher and principal* and must be *resubmitted at the beginning of every school year*. Parents may also want to send a copy via certified mail to the school. In addition, pupils cannot be subjected to disciplinary action, academic penalty, or other sanction if the student is excused from the teaching of these subjects. Moreover, the student must be excused from such attendance without any penalty, including class credits or academic standing.⁹⁵

Additionally, parents should also be aware that their child need not participate in any anonymous, voluntary, or *confidential test, questionnaire, or survey on pupil health behaviors and risks*, if the school has received a written request from the pupil’s parent or guardian excusing the pupil from participation.

X. Prohibition on tests or surveys regarding personal beliefs or practices of students or their parents on religion, morality, sex, and religion

Families have a general constitutional right to be left alone.⁹⁶ Because students are a captive audience when at school, it is unconscionable for school authority figures to use their positions to probe into the private lives of

⁹⁵ NRS § 389.036(4).

⁹⁶ *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 736 (1970).

students. Nor should highly sensitive information about a student's family be sought through questionnaires and surveys. A minor cannot waive the constitutional rights, including that of privacy, of his or her parents.

In view of this, federal law provides for specific protections to students and their families. Without the prior written consent of a parent, no student may be required to submit to any survey, analysis, or evaluation that reveals any information concerning, among other things, the student's personal beliefs or practices in sex, family life, morality, and religion, or any questions about the student's parents' beliefs and practices in sex, family life, morality, and religion.⁹⁷

XI. School districts have the authority to regulate political expression by teachers in the classroom

School districts have vast discretion when setting board policies regarding teacher speech in the classroom. Unlike student speech, which can only be regulated when it causes a "material or substantial interference"⁹⁸ with school discipline, a teacher's political speech can be regulated even when passive.⁹⁹

Prohibitions on political speech in the classroom are especially important because "a State may permissibly determine that, at least in some precisely delineated areas, a

⁹⁷ 20 U.S.C. § 1232(h).

⁹⁸ *Tinker*, *supra* 393 U.S. 503.

⁹⁹ NRS § 388.135.

child —like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”¹⁰⁰ In order to protect these students, school boards should pass specific regulations prohibiting politically biased speech by teachers in the classroom.

The following are examples of possible school board policies that allow teachers to exercise their free speech rights, while also protecting students from unrestricted indoctrination:

Proposed Policy: *The Board requires teachers to ensure that all sides of a controversial issue are impartially presented, with adequate and appropriate factual information. Without promoting any partisan point of view, the teacher shall help students separate fact from opinion and warn pupils against drawing conclusions from insufficient data.*

Proposed Policy: *Controversial issues may be discussed in the classroom, provided that. . .1.) All sides of the issue are given a proper hearing using established facts as primary evidence. . .2.) The teacher does not use his/her position to advance his/her own religious, political, economic or social views. The teacher may express a personal opinion if he/she identifies it as such and does not express the opinion for the purpose of persuading students to his/her point of view.*

¹⁰⁰ *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (J. Brennan, concurring).

XII. Schools may allow release time programs

A release time program is one where public school students are dismissed from their regular classes, usually for the last hour of school on a Friday afternoon, and receive instruction from someone other than school personnel. These programs can cover broad topics, including religious instruction such as “The Old or New Testament.” Instructors can also conduct topical lessons on biblical themes.¹⁰¹

In general, public schools may permit the release of students during school hours to attend religious classes taught by religious teachers on private property.¹⁰² However, schools may not allow religious instruction to take place on school grounds during school time.¹⁰³

Schools can choose to allow release time classes to satisfy elective credits as long as the policy is neutrally stated and administered.¹⁰⁴ 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. At the very least, a school can count the hour towards attendance for the purposes of receiving their daily attendance funding.¹⁰⁵ 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

¹⁰¹ The NRS does not specifically address absences for religious reasons. *See* NRS § 388.135.

¹⁰² *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

district, consult the school board's policy on "release time" programs.

XIII. Instructors Can Make References to Religion While Teaching

Can the music program still perform the *Hallelujah Chorus*? Must Dante's *Inferno* be banned from the English department? Will the history department be prohibited from showing the civil rights speech, "I Have a Dream," to students because it was delivered by a Baptist minister (Martin Luther King, Jr.) who unapologetically acknowledged his faith in God in the speech?

Many teachers find that proper coverage of certain subject matter requires reference to religion or the actual use of religious materials. Fearing professional discipline or a lawsuit, teachers frequently feel they cannot provide the best instruction for their students because they believe they must eliminate all such references. Indeed, the State academic standards may direct teaching for which religion is at issue.

The truth is that, when an instructor believes that incidental or illustrative reference or other use of religious materials are important for pedagogical reasons, the teacher has a right to act in the best interest of students. Under Nevada law, references to religious art, literature, music, dance, or other topics having religious significance are legal in the classroom. It should be noted that, while it has never been the subject of a court case, the NRS does not allow the introduction of "books, tracts or papers of a

sectarian or denominational character...nor may any sectarian or denominational doctrines be taught in any public school.”¹⁰⁶ This is in accordance with Section 9 of Article 11 in the Nevada Constitution.¹⁰⁷ The NRS specifically notes, though, that nothing therein shall prevent a school district from complying with applicable federal laws,¹⁰⁸ including the Equal Access Act. ¹⁰⁹ As long as religious principles are not taught and the instruction is not meant to aid any religious sect, church, creed, or is for a sectarian purpose, teachers are free to make appropriate religious references.

It should also be noted that many teachers have an “academic freedom clause” in their employment contract. As such, it is advisable that this document be reviewed carefully in that it may provide even greater rights than those found in the Nevada Revised Statutes. The general rule is that the higher the grade level, the greater the academic freedom of the instructor.

XIV. 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. Moreover, 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.

¹⁰⁶ NRS § 388.150(1).

¹⁰⁷ Nev. Const. Art. 11, § 9.

¹⁰⁸ NRS § 388.150(3).

¹⁰⁹ 20 U.S.C. §§ 4071 et seq.

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