



Legally Asserting Religious Rights and Values In Illinois Schools

Pacific Justice Institute

PROTECTING FAITH, FAMILY AND FREEDOM

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April 2013

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 our founding 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 thirteen critical issues confronting public education today. From Bible clubs to confidential medical release, 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 clubs on campus

We are aware that many school administrators fear that allowing a Christian 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 Although separation of church and state is important in certain contexts, 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.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.

Over thirty years ago, the United States Supreme Court decided *Tinker v. Des Moines School District*. This case involved several students who had been unconstitutionally suspended from

¹ See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

² See *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].

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.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 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.”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 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

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 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).

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 (underline added).”]

In addition to being constitutionally protected, the right of students to meet on campus during school non-instructional hours is protected by the Equal Access Act.¹¹ The 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.” If the school allows any non-curriculum groups to meet on campus, the Bible/Christian group must be afforded the same equal access as other non-curriculum groups.

Within the context of the federal Equal Access Act, the Supreme Court has defined “non curriculum student groups” as “any student group that does not directly relate to the body of courses offered by the school.”¹² 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.”¹³

Applying these criteria, the 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 Court held, make them sufficiently related to a school's

¹¹ 20 U.S.C. §4071 (2004).

¹² *Westside Community Board of Education v. Mergens*, 496 U.S. 226, 239-40 (1990).

¹³ *Id.* at 239-40.

curriculum so that application of the Equal Access Act may be avoided.¹⁴

Additionally, based upon these criteria, student groups and clubs like Key Club, Honor Society, and Student Council are considered non-curriculum related.¹⁵ If groups like these are allowed to meet on campus during school instructional hours, the school is under a legal obligation to afford the same, or similar, accommodations to a Bible/Christian club. Such an accommodation cannot be legally denied.

II

Students can share their faith on campus

The 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.¹⁶ 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.¹⁷ Interference, however, does not include some students finding the speech offensive; mere discomfort at the subject matter is not sufficient to restrict student speech.¹⁸

¹⁴ *Id.* at 244; *See, also, Van Schoick v. Saddleback Valley Unified School District*, 87 Cal. App.4th 522, 529 (2001).

¹⁵ *See, e.g., Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1252 (3rd Cir. 1993)[the asserted 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 [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.]

¹⁶ *Tinker, supra* n. 6, 393 U.S. 503.

¹⁷ *Id.* at 508-509.

¹⁸ *Id.* at 509.

A. Right to use evangelistic material when witnessing

It is generally recognized that high school students can distribute religious materials containing Bible verses.¹⁹ Students can also use religious tracts when they share their faith because tracts and other evangelism materials constitute constitutionally protected speech.²⁰ As such, the First Amendment protects a student's right to distribute religious materials on campus.²¹ Religious literature is 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."²²

In fact, a school cannot even require students to give advance notice when they plan to leaflet.²³ Schools also lack the power to restrict students to a certain area when passing out religious materials, unless the students are disrupting school discipline.²⁴

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

¹⁹ *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989).

²⁰ *Heffron v. International Society 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).

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

²² *Rivera*, *supra* n. 21, 721 F. Supp. 1189 (D. Colo. 1989).

²³ *Thomas v. Collins*, 322 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).

²⁴ *Johnston-Loehmer v. O'Brien*, 859 F. Supp. 575.

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 the Equal Access Act and Supreme Court precedent.²⁵ Because they are agencies of the government, public schools must also ensure that they do not impose overly broad or arbitrary speech regulations on students. In other words, any school action or school district policy that has an impact on student speech must not be applicable to constitutionally protected expression.²⁶ If a school allows any club to put on skits, have a band perform, or other lunchtime presentations, then the school must also give a faith-based club these same rights.

III

Students can pray on campus

A student has the right to engage in personal prayer on a public school campus.²⁷ Contrary to popular belief, students are not even forbidden from engaging in *public prayer* at school. Moreover, students can gather and pray on school property before the school day officially begins.²⁸ High school students can

²⁵ 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...”] and *Rosenberger v. Rectors and the Univ. of Virginia*, 515 U.S. 819, 828-829 (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.”]

²⁶ See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

²⁷ *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

²⁸ *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 589-590 (N.D. Miss). (1996).

engage in voluntary group prayer, and elementary students can participate in group prayer with parental consent.²⁹ Thus, schools cannot deprive students of this right by refusing to allow student organized meetings.³⁰ “See You at the Pole” is an example of a student-led, student-initiated movement of prayer 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.”³¹ 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).

B. Student-Initiated Group Prayer at Public School

The Constitution’s recognition 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 First Amendment.³² In order for a prayer to be considered private speech and therefore protected by the Constitution, it must be genuinely student-initiated and voluntary.³³ A prayer can be spoken aloud among a group of students as long as it does not “materially disrupt” the

²⁹ *Id.*

³⁰ *Daugherty v. Vanguard Charter Academy*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000).

³¹ *Santa Fe Independent Sch. Dist.*, 530 U.S. at 313 (2000).

³² *Chandler*, *supra* 230 F.3d at 1317.

³³ *Id.*

learning environment.³⁴ These private, vocal prayers can occur in the midst of an audience assembled for some other purpose.³⁵ 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 times

In *Breen v Runkel*,³⁶ a federal court upheld the constitutionality of the activities of public school students who attended lunchtime Bible meetings. These Bible meetings occurred during a non-curriculum part of the school day and did not disrupt the educational environment or infringe on the rights of fellow students. If students are allowed to attend such lunchtime Bible meetings, then they are 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.³⁷ Moreover, the Supreme Court requires that school officials

³⁴ *Tinker*, *supra* n. 6., 393 U.S. at 509.

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

³⁶ *Breen v. Runkel*, 614 F Supp 355 (1985, W.D. Mich.).

³⁷ *Widmar*, *supra* n. 9, 454 U.S. at 269.

recognize students' constitutional rights in the school setting.³⁸ The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.³⁹ As a result, students are entitled to freely express their religious views by reading their Bible during the school day, insofar as a student's 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-curriculum 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."⁴⁰ 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.⁴¹

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.

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 occur during non-curricular

³⁸ *Tinker*, *supra* n. 6, 393 U.S. at 506.

³⁹ *Id.* at 512-513.

⁴⁰ *Id.* at 509

⁴¹ *Id.*

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.⁴² Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.⁴³

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.⁴⁴ 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.⁴⁵ Courts have also held that the Bible has a legitimate place in public school libraries.⁴⁶

⁴² *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

⁴³ *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).

⁴⁴ *Widmar*, *supra* n. 9, 454 U.S. at 269-270.

⁴⁵ *Stone v. Graham*, 449 U.S. 39, 42 (1980)

⁴⁶ *Roberts v. Madigan*, 702 F.Supp. 1505, 1512 (D. Colo. 1989).

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:

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.⁴⁷

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.

⁴⁷ See Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools. 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.

VI

Schools 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 recent 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.”⁴⁸ 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.⁴⁹ 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.”⁵⁰

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 Court rejected this argument, however, finding that the Establishment Clause does not prohibit “private religious conduct during nonschool hours merely because it takes place on school premises.”⁵¹ The Court also found that the danger of students misperceiving the religious event as one which

⁴⁸ *Good News Club*, *supra* n. 9, 533 U.S. 98.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

the school sponsored was no greater threat than students perceiving religious hostility if the school did not allow the event.⁵²

In another Supreme Court case, a private religious group wanted to use school grounds to present religious films.⁵³ The Court held that as long as the films were shown during nonschool 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.⁵⁴ Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.⁵⁵ If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.⁵⁶

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.

VII

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

A. Celebrating a Religious Holiday in School and the Classroom

⁵² *Id.*

⁵³ *Lamb's Chapel, supra* n. 9., 508 U.S. 384.

⁵⁴ *Id.*

⁵⁵ *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044 (9th Cir 2003).

⁵⁶ *Id.*

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 seasonable 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.⁵⁷

The fact that a particular religious holiday has become a significant secular tradition is also a permissible reason 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.”⁵⁸ 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 is 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

⁵⁷ *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 909 (D. N.J. 1993).

⁵⁸ *Floreys v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir. 1980).

message of inclusion and the freedom of one to choose his or her own beliefs.⁵⁹

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-religious students or a perceived “separation of church and state” concern. 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

Review of instructional materials

Parents are at times concerned that the instruction in the classroom is inconsistent with the values taught in the home and at church. What is taught in the school need not remain a mystery. The Illinois Legislature has provided a very direct remedy via statute. “Any member of the public may inspect all text and instructional material used in the public schools.”⁶⁰

⁵⁹ *Sechler v. State College Area Sch. Dist.*, 121 F. Supp. 2d 439 (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).

⁶⁰ 105 ILCS § 5/28-19.1

IX

Parents' right to opt children out of certain classes

Typically, parents cannot have their children excused from instruction deemed objectionable. However, in Illinois, there are some exceptions to this as illustrated in the two examples below.

No pupil shall be required to take or participate in any class or course on AIDS or family life instruction if his parent or guardian submits written objection thereto, and refusal to take or participate in the course or program shall not be reason for suspension or expulsion of the pupil.⁶¹

No pupil shall be required to take or participate in any class or course in comprehensive sex education if his parent or guardian submits [a] written objection....⁶²

It should be noted that a student cannot be punished because his parent exercises this right.⁶³

⁶¹ 105 ILCS § 110/3

⁶² 105 ILCS § 5/27-9.1

⁶³ Id.

X

Time off for observance of a religious holiday

Students can be excused from school to observe a religious holiday.⁶⁴ This includes being excused from “any examination or any study or work assignments on such particular day or days.”⁶⁵ Teachers and school officials are responsible to make available to the pupil “an equivalent opportunity to make up any examination, study or work requirements which he has missed.”⁶⁶ Finally, the student cannot be punished for taking time off for the observance of the holiday.⁶⁷

XI

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.

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⁶⁴ 105 ILCS § 5/26-2b

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

For further assistance, please

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