Public Education: Religious Rights and Values in Ohio 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

The U.S. Constitution and Ohio Constitution both provide equal protection for students to express their religion in public schools. Ohio Law states, "A student enrolled in a public school may engage in religious expression before, during, and after school hours in the same manner and to the same extent that a student is permitted to engage in secular activities or expression before, during, and after school hours."[1]

The Ohio Constitution affords the following:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[2]

[1] ORC Ann. § 3320.02(A).
[2] Oh. Const. Art. I § 7.

A. Religious coursework

Ohio law provides specific protections for pupil coursework if based on religious content:

> No school district board of education, governing authority of a community school . . . governing body of a STEM school . . . or board of trustees of a college-preparatory boarding school . . . shall prohibit a student from engaging in religious expression in the completion of homework, artwork, or other written or oral assignments. Assignment grades and scores shall be calculated using ordinary academic standards of substance and relevance, including any legitimate pedagogical concerns, and shall not penalize or reward a student based on the religious content of a student's work.[3]

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

As used in the Ohio Student Religious Liberties Act of 2019, "religious expression" includes any of the following for the state of Ohio:

> (1) Prayer;
> (2) Religious gatherings, including but not limited to prayer groups, religious clubs, "see you at the pole" gatherings, or other religious gatherings;
> (3) Distribution of written materials or literature of a religious nature;
> (4) Any other activity of a religious nature, including wearing symbolic clothing or expression of a religious viewpoint, provided that the activity is not obscene, vulgar, offensively lewd, or indecent.[4]

[3] O.R.C. Ann. § 3320.03.
[4] O.R.C. Ann. § 3320.01(B).

"A student enrolled in a public school may engage in religious expression before, during, and after school hours in the same manner and to the same extent that a student is permitted to engage in secular activities or expression before, during, and after school hours."[5] Moments of silence are also permitted in Ohio public schools, but students are not required to participate:

> The board of education of each school district may provide for a moment of silence each school day for prayer, reflection, or meditation upon a moral, philosophical, or patriotic theme. No board of education, school, or employee of the school district shall require a pupil to participate in a moment of silence provided for pursuant to this section. No board of education shall prohibit a classroom teacher from providing in the teacher's classroom reasonable periods of time for activities of a moral, philosophical, or patriotic theme. No pupil shall be required to participate in such activities if they are contrary to the religious convictions of the pupil or the pupil's parents or guardians.
>
> No board of education of a school district shall adopt any policy or rule respecting or promoting an establishment of religion or prohibiting any pupil from the free, individual, and voluntary exercise or expression of the pupil's religious beliefs in any primary or secondary school.[6]

C. Clothing

In Ohio, students may wear "symbolic clothing or expression of a religious viewpoint, provided that the activity is not obscene, vulgar, offensively lewd, or indecent."[7]

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[5] O.R.C. Ann. § 3320.02(A).
[6] O.R.C. Ann. § 3313.601.
[7] O.R.C. Ann. § 3320.01(B)(4).

Teachers may also wear religious clothing in public schools. One court held, "[I]n the absence of statute or regulation—none exist here—religious garb may be worn by teachers in teaching in public schools."[8] Additionally, an Ohio court acknowledged that the "religious garb" does not teach, as it is the teacher who does the teaching.[9]

D. Employment discrimination

State law protects against discrimination based on religion:

> It shall be an unlawful discriminatory practice: For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment."[10] Teachers may be terminated due to insubordination. However, the Ohio Supreme Court has held that teachers may keep their personal Bibles on their desks.[11]

II. Equal access to school facilities

Both federal and Ohio 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

[8] *Moore v. Bd. of Edn.*, 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P.1965).
[9] *Id*. (citing *Rawlings v. Butler, Ky.*, 290 S.W. 2d 801, 60 A.L.R. 2d 285).
[10] O.R.C. Ann. § 4112.02(A).
[11] *Freshwater v. Mount Vernon City Sch. Dist. Bd. of Educ.*, 2013-Ohio-5000, 137 Ohio St. 3d 469, 1 N.E.3d 335.

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."[12] (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."[13] The EAA does not violate the Establishment Clause of the U.S. Constitution's First Amendment.[14] 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.[15]

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."[16] Meetings (1) must be voluntary and student-initiated; (2) must be without sponsorship

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[12] 20 U.S.C. § 4071(a).

[13] 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).

[14] *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).

[15] *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cnty.*, 249 F. Supp. 3d 1286 (M.D. Fla. 2017).

[16] 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.)

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.[17]

"Noninstructional time" means "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[18] 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 religious club the opportunity to meet during lunch as other clubs were allowed to.[19] 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.[20] 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.[21]

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[17] 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.)

[18] 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.)

[19] *Ceniceros by & Through Risser v. Bd. of Trustees*, 106 F.3d 878 (9th Cir. 1997).

[20] *Id.* at 881.

[21] *Id.*

Other federal courts have come to the same conclusion concerning noninstructional lunch periods.[22]

A "noncurriculum related student group" is "any student group that does not directly relate to the body of courses offered by the school."[23] 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."[24] 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 the school.[25]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.[26] 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

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[22] *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).

[23] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990).

[24] *Id*. at 239-240; *Straights & Gays for Equality v. Osseo Area Schs*., 471 F.3d 908 (8th Cir. 2006).

[25] *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).

[26] *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).

them sufficiently related to a school's curriculum so that application of the EAA may be avoided.[27]

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."[28] 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.[29] 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."[30]

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 non-school hours merely because it takes place on school premises."[31] 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.[32]

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[27] *Mergens*, 496 U.S. at 244.
[28] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001).
[29] *Id*. at 111.
[30] *Id*. at 114.
[31] *Id*. at 115.
[32] *Id*. at 118.

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.[33] 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.[34]

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.[35] If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.[36]

Finally, elected officials and school employees are free to attend such services in their capacities as private citizens. 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. Ohio Law

Ohio law also confirms that students have a right to use school facilities for religious groups. The Ohio statute appears to provide even broader access for religious groups (including elementary schools) compared to the EAA:

> A school district, community school . . . STEM school . . . or a college-preparatory boarding school . . . shall give the same access to school facilities to students who wish to conduct a meeting for the

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

> purpose of engaging in religious expression as is given to secular student groups, without regard to the content of a student's or group's expression.[38]
>
> A student enrolled in a public school may engage in religious expression before, during, and after school hours in the same manner and to the same extent that a student is permitted to engage in secular activities or expression before, during, and after school hours.[39]

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.[40] 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.[41] 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."[42]

As a matter of law, the Constitution "affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any."[43] Therefore, limiting the existence or religious expression of a religious club based on a fear

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[38] ORC Ann. § 3320.02(B).
[39] ORC Ann. § 3320.02(A).
[40] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).
[41] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).
[42] *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984).
[43] *Id.* (internal citations omitted) (emphasis added).

of violating "he separation of church and state is clearly mislaid. 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.[44] 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.[45] 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."[46]

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."[47] 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.[48] Such discrimination necessarily amounts to an unconstitutional act of state sponsored hostility toward religion.[49] 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

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[44] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968).
[45] *Id.* at 506.
[46] *Id.* at 511.
[47] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).
[48] *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).
[49] *See, generally, Lynch*, 465 U.S. 668 (1984).

allowing a public school to prohibit student religious expression on campus during non-instructional hours.[50]

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.[51] 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.[52] This means that when students can share their faith when they are outside of class.[53] Student speech can only be restricted when it substantially interferes with school discipline.[54] Interference, however, does not include some students finding the speech offensive; mere discomfort at the

[50] 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."
[51] 20 U.S.C. § 4071 (2004).
[52] *Tinker*, 393 U.S. at 503 (1968).
[53] *Id.* at 503.
[54] *Id.* at 508-09.

subject matter is not sufficient to restrict student speech.[55] Finally, speech in a limited public forum may only be subject to viewpoint-neutral limitations.[56]

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.[57] Students can also use religious tracts when they share their faith because tracts and other evangelistic materials constitute constitutionally protected speech.[58] As such, the First Amendment protects a student's right to distribute religious materials on campus.[59] 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."[60]

In fact, a school cannot even require students to give advance notice when they plan to pass out religious tracts.[61] Further, the Sixth Circuit has held that distribution of flyers involving religious activities must be allowed when the school district allows flyers regarding other nonprofit community activities.[62]

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[55] *Id.* at 509.
[56] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).
[57] *Rivera v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989).
[58] *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).
[59] *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).
[60] *Rivera*, 721 F. Supp. at 1189.
[61] *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).
[62] *Rusk v. Crestview Local School Dist.*, 379 F3d 418 (6th Cir. 2004).

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.[63] 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.[64] 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.[65]

Ohio state law also affirms the freedom to distribute religious materials when sharing about faith. Under Ohio law, the statute states that students may distribute "written materials or literature of a religious nature."[66] This form of religious expression may be engaged in the same way that a student may engage in secular activities before, during, or after school hours.[67]

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.[68] If a school allows any club to put on skits or

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[63] *Tinker*, 393 U.S. at 514.
[64] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also Curry v. Hensiner,* 513 F3d 570 (6th Cir. 2008).
[65] *Id.*
[66] O.R.C. Ann. § 3320.01(B)(3).
[67] O.R.C. Ann. § 3320.02(A).
[68] *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*

lunchtime presentations, then the school must also allow students who want to put on religious skits or lunchtime presentations to do so as well. In Ohio, students are allowed to express their religion "before, during, and after school hours" in the "same manner and to the same extent that a student is permitted to engage in secular activities or expression."[69]

V. Praying on campus

A student has the right to engage in personal prayer on a public school campus.[70] 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.[71] 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.[72] 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*.[73] Indeed, students can gather and pray on school property *before the school day officially begins*.[74] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[75]

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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.")

[69] O.R.C. Ann. § 3320.02(A).

[70] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2001), *cert. denied*, 533 U.S. 916 (2001).

[71] *Tinker*, 393 U.S. at 509.

[72] *Chandler*, 230 F. 3d at 1317.

[73] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

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

[75] *Tinker*, 393 U.S. at 512-13.

Equal protection prohibits public schools from discriminating against religious expression. In the state of Ohio, prayer is included as an activity under the definition of "religious expression."[76] According to the applicable statute, "A student enrolled in a public school may engage in religious expression before, during, and after school hours in the same manner and to the same extent that a student is permitted to engage in secular activities or expression before, during, and after school hours."[77] In other words, in the state of Ohio, a student is free to engage in prayer the same way the student is free to engage in regular, secular activities throughout the day.

VI. Taking religious texts to school and reading them there

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

The Ohio Constitution and the First Amendment to the U.S. Constitution ensure the right to free speech, which includes the right of religious expression.[78] School officials must recognize students' constitutional rights in the school setting.[79] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[80] 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.[81]

If students are allowed to attend such lunchtime religious meetings under the Equal Access Act (see above), then they are

[76] ORC Ann. § 3320.01(B).
[77] ORC Ann. § 3320.02(A).
[78] U.S. Const. Amend. I; Oh. Const. Art. I, § 11; *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).
[79] *Tinker*, 393 U.S. at 506.
[80] *Tinker*, 393 U.S. at 512-13.
[81] *Id.* at 509.

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."[82]

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."[83] Thus, the school is able to exercise some discretion in order to avoid the appearance that it is endorsing a particular religion.[84]

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 allowing all other

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[82] *Tinker*, 393 U.S. at 509.
[83] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
[84] *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).

literature.[85] Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.[86]

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.[87] 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.[88] 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.[89]

The Supreme Court of Ohio has held that a Board of Education can prohibit the teaching of the Bible in the classroom.[90] The court leaves the decision on teaching the Bible in public schools to the various boards of education in the state.[91] The court

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[85] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).
[86] *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).
[87] *Widmar v. Vincent*, 454 U.S. 263 (1981).
[88] *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).
[89] *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.*
[90] *Bd. of Edn. v. Minor*, 23 Ohio St. 211 (1872).
[91] *Id.*

held that the Ohio Constitution does not require the teaching of religious books or religious instruction in the public schools.[92]

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.[93]

The U.S. Circuit of Appeals for the Sixth Circuit Court affirms that teachers have discretion in accepting and grading assignments accordingly when the religious material is not relevant to the assignment.[94]

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[92] *Bd. of Edn. v. Minor* at 243.

[93] 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.

[94] *Settle v. Dickson County School Bd.*, 53 F3d 152 (6th Cir. 1995); *DeNooyer v. Livonia Public Schools*, 12 F3d 211 (6th Cir. 1993).

Ohio law adds:

> No school district board of education, governing authority of a community school . . . governing body of a STEM school . . . or board of trustees of a college-preparatory boarding school . . . shall prohibit a student from engaging in religious expression in the completion of homework, artwork, or other written or oral assignments. Assignment grades and scores shall be calculated using ordinary academic standards of substance and relevance, including any legitimate pedagogical concerns, and shall not penalize or reward a student based on the religious content of a student's work.[95]

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. Teachers may not punish a student for sharing religious viewpoints in homework assignments.

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.[96] 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.[97] Federal courts are

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[95] O.R.C. Ann. § 3320.03.

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

[97] *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

currently split on what is allowed as far as student-initiated prayer in graduation ceremonies.[98]

The recent Ohio Student Religious Liberties Act of 2019 states: "A student enrolled in a public school may engage in religious expression before, during, and after school hours in the same manner and to the same extent that a student is permitted to engage in secular activities or expression before, during, and after school hours."[99]

IX. Acknowledging and celebrating religious holidays

Ohio law is silent as to whether public schools can recognize religious holidays. School board districts decide which holidays to recognize. For example, Akron Public schools have closed for Good Friday,[100] and Cincinnati Public Schools acknowledge Christmas as a holiday.[101] Regarding the celebration of religious holidays, the Sixth Circuit has held that a student could be prohibited from passing out candy canes with a Christian

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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 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."

[98] *See Adler v. Duval County School Bd.*, 250 F3d 1330 (11th Cir. 2001); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F3d 1471 (3rd Cir. 1996).

[99] O.R.C. Ann. § 3320.02(A).

[100] https://www.akronschools.com/calendar.

[101] https://www.cps-k12.org/news/calendar.

message attached, as the distribution of the candy canes was part of an instructional activity and the religious message may appear to be endorsed by the school.[102]

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.[103]

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.

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[102] *Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008).

[103] *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.[104] 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.

[104] *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).

X. Release time

A release time program is "a period of time during which a student is excused from school to attend a course in religious instruction conducted by a private entity off school district property."[105] Ohio law allows for school district boards of education to permit release time courses for students to receive religious instruction outside of the school.[106] Consult the school board district's policy on "release time" programs.

If a school district board of education allows for a release time program, each of the following must apply:

> (1) The student's parent or guardian gives written consent.
> (2) The sponsoring entity maintains attendance records and makes them available to the school district the student attends.
> (3) Transportation to and from the place of instruction, including transportation for students with disabilities, is the complete responsibility of the sponsoring entity, parent, guardian, or student.
> (4) The sponsoring entity makes provisions for and assumes liability for the student.
> (5) No public funds are expended and no public school personnel are involved in providing the religious instruction.
> (6) The student assumes responsibility for any missed schoolwork.[107]

In addition, Ohio law states: "While in attendance in a released time course in religious instruction, a student shall not be considered absent from school. No student may be released from a core curriculum subject course to attend a religious instruction course."[108]

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[105] O.R.C. Ann. § 3313.6022(A).
[106] O.R.C. Ann. § 3313.6022(B).
[107] O.R.C. Ann. § 3313.6022(B)(1)-(6).
[108] O.R.C. Ann. § 3313.6022(B).

If a school district board of education allows for a release time program, high school students may be awarded up to "two units of high school credit" for completing a course in religious instruction.[109] Ohio law provides various criteria for how credit may be awarded to students.[110] Regardless of how it may be determined that a student has earned high school credit, "the decision to award credit for a released time course of religious instruction shall be neutral to, and shall not involve any test for, religious content or denominational affiliation."[111]

School personnel may invite students to participate in religious release time programs in their capacity as private citizens. There are multiple factors that determine whether a school employee was acting in an official capacity or a private citizen.[112] The following language from an opinion from the Ohio Attorney General further explains some of the factors:

> When determining whether an employee spoke as a private citizen or whether the speech was pursuant to the employee's official duties, the court looks to "content and context – including to whom the statement was made[,]" as well as, "the 'impetus for the speech, the setting of the speech, and speech's audience, and its general subject matter.'" *Keeling v. Coffee Cnty.*, 541 Fed. Appx. 522, 526 (6th Cir. 2013) (citations omitted). "'[W]hether the speech was made inside or outside of the workplace and whether it concerned the subject-matter of the speaker's employment' are relevant considerations but are not dispositive." *Henderson v. City of Flint*, No. 17-2031, 2018 U.S. App. LEXIS 26855, *12 (6th Cir. Sept. 20, 2018) (quoting *Handy-Clay v. City of Memphis*, 695 F.3d at 540-541). The same

[109] O.R.C. Ann. § 3313.6022(C).
[110] O.R.C. Ann. § 3313.6022(C)(1)-(4).
[111] O.R.C. Ann. § 3313.6022(C).
[112] 2019 OAG No. 015.

> may be said of whether the speech occurs outside of the employee's working hours. Whether the speech occurs during non-working hours is a factor, but is not dispositive, of whether the speech occurs as part of the performance of official duties.[113]

Finally, 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)[114] 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;

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

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[113] "A public school employee's speech about participation in religious instruction courses may occur outside of the employee's working hours, but may nevertheless constitute or be construed as speech in which an employee engaged pursuant to the employee's official duties. For example, a guidance counselor comes upon a student during non-school hours, off school property, and in a venue other than a school function, and has a conversation with the student about courses to enroll in for the upcoming school year. During that conversation, the guidance counselor discourages the student from participating, or, conversely encourages the student to participate in released time religious instruction courses. Although the conversation occurs outside of working hours, because advising students on available courses is part of the guidance counselor's duties, one may question whether the guidance counselor engaged in the speech as a private citizen." 2019 OAG No. 015.

[114] "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/.

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.[115]

Schools can choose to allow release time classes to satisfy elective credits as long as the policy is neutrally stated and administered.[116] 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

The Ohio Constitution applies to public postsecondary institutions regarding the matter of religious freedom:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and

[115] *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/.
[116] *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).

> affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."[117]

Aside from the Ohio Constitution, the Ohio statutes regarding religious freedom arguably may apply to public postsecondary institutions. The Ohio Student Religious Liberties Act of 2019 was recently enacted in 2020. The Act includes language applying in one statute to "students enrolled in a public school."[118] Therefore, one may argue that this legislation also applies to college students in public postsecondary education.

PART II: PARENTS' RIGHTS

I. Constitutional rights of parents under the U.S. Constitution and Ohio 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."[119] 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

[117] Oh. Const. Art. I, § 7.
[118] O.R.C. Ann. § 3320.02(A).
[119] U.S. Const. Amend. XIV.

perhaps the oldest of any fundamental liberty interest that the Court had recognized.[120]

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."[121] 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.[122] In 1944, the Court affirmed the right of parents to direct the 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."[123] 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."[124]

Similarly, Ohio has determined that the fundamental liberty interest in parenting one's child is protected under the Ohio Constitution.[125] The applicable article of the Ohio Constitution states: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."[126] One Ohio court noted that caselaw firmly establishes "the principle that government will not interfere with the right to the control and custody of minor children by their parents, except in cases of

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[120] *Troxel v. Granville*, 530 U.S. 57 (2000).
[121] *Id.* at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).
[122] *Id.* at 65 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925)).
[123][123] *Id.* at 65-66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).
[124] *Id.* at 66 (quoting *Parham v. J.R.* 442 U.S. 584, 602 (1979)).
[125] *Kraus v. Cleveland*, 116 N.E.2 779 (Ct. Com. Pl. 1953).
[126] Oh. Const. Art. I, § 1.

neglect or delinquency of such children, in which situation the children become wards of the state."[127]

II. Access to student records and information

A. FERPA and O.R.C. Ann. § 3319.321

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.[128] The major federal law covering the privacy of 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.

Ohio's student records law is O.R.C. Ann. § 3319.321, and the administrative rule is Ohio Admin. Code, Rule 3301-2-17. Both FERPA and the Ohio 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.[129]

According to Ohio law, the following records must be kept for students: "The records of each school, in addition to all other requirements, shall be so kept as to exhibit the names of all pupils enrolled therein, the studies pursued, the character of the work done and the standing of each pupil; and these records shall be as nearly uniform throughout the state as practicable."[130] Student records and transcripts must be obtained through the school that

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[127] *Kraus v. Cleveland* at 803 (citing *In re Hudson,* 126 P.2d 765 (1942); *Heinemann's Appeal,* 96 Pa. 112, 42 Am. Rep. 532 (1880); *People ex rel. Wallace v. Labrinz,* 411 Ill. 618, 104 N.E. (2d) 769; *Morrison v. State, Mo. App.,* 252 S.W. (2d) 97 (1952); *In re Rotkowitz,* 175 Min. 948, 25 N.Y.S. (Ad) 624 (1941); *In re Vasko,* 238 App. Div. 128, 263 N.Y.S. 552 (1933)).
[128] Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g); O.R.C. Ann. § 3319.321.
[129] *Id.*
[130] O.R.C. Ann. § 3319.32.

was attended.[131] The Ohio Department of Education does not keep educational records for students.[132]

FERPA give students and parents the right to:

1. Access students' education records, including the right to inspect and review those records.[133]

2. Waive their access to the students' education records in certain circumstances.[134]

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.[135]

4. Privacy with respect to such records and reports.[136]

5. Receive annual notice of their rights with respect to education records.[137]

Student education records, as defined by FERPA, and the federal regulations issued pursuant thereto, are confidential.[138] An agency or institution may not release education records without the written consent of the student (18 years or older) or parent to any individual, agency, or organization, except in accordance with and as permitted by FERPA.[139] One exception is for certain law enforcement purposes.[140]

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[131] http://education.ohio.gov/Topics/Learning-in-Ohio/Career-and-College-Planning/Obtaining-Student-Records.
[132] *Id.*
[133] 20 U.S.C. § 1232g(a)(1)(A)-(B).
[134] 20 U.S.C. § 1232g(a)(1)(D).
[135] 20 U.S.C. § 1232g(a)(2).
[136] 20 U.S.C. § 1232g(b)(1); Ohio Admin. Code, Rule 3301-2-17.
[137] 20 U.S.C. § 1232g(e).
[138] Ohio Admin. Code, Rule 3301-2-17.
[139] O.R.C. Ann. § 3319.321(B).
[140] O.R.C. Ann. § 3319.321.

B. Other Ohio Laws

Ohio laws give the parent of a K-12 student the right to:

1. Promptly examine, upon request and regarding the parent's own child: "(1) Any survey or questionnaire, prior to its administration to the child; (2) Any textbook, workbook, software, video, or other instructional materials being used by the district in connection with the instruction of the child; (3) Any completed and graded test taken or survey or questionnaire filled out by the child; (4) Copies of the statewide academic standards and each model curriculum developed pursuant to section 3301.079 of the Revised Code, which copies shall be available all times during school hours in each district school building."[141]

2. Receive a copy of the most recent report card from a school official issued under 3302.03 of the Revised Code during the admissions process, "when a student enrolls in a school operated by a city, exempted village, or local school district."[142]

3. Receive report cards (which must be distributed to parents of all students) from a community school.[143]

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),[144] which applies to the education records covered by this law. However, IDEA release and disclosure requirements are substantially identical to those in FERPA.

[141] O.R.C. Ann. § 3313.60(G)(1)-(4).
[142] O.R.C. Ann. § 3313.6411(B).
[143] O.R.C. Ann. § 3314.012(D).
[144] 20 U.S.C. § 1400 et seq.

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 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.

In the state of Ohio, health education is included as a requirement for promotion to ninth grade and for graduation from high school.[145] Applicable law specifically states the topics that must be included for the health education requirement.[146] One of the requirements for health education is venereal disease education.[147] However, parents or the student's guardian may provide a written statement to the school, which shall then excuse the student from having to take the instruction on venereal disease education.[148]

II. Parents may opt their K-6 children out of instruction in personal safety and assault prevention.

Another requirement for health education in the state of Ohio is instruction in personal safety and assault prevention.[149] This instruction is provided to students in grades K-6.[150] Parent may opt their K-6 children out of this instruction by providing written notice to the school.[151]

III. Parents may opt their grades 6-12 children from various health education requirements.

In addition to being able to opt their children out of venereal disease education, there are also other health education instructions that parents may choose for their

[145] O.R.C. Ann. § 3313.60(A)(5).
[146] *Id.*
[147] O.R.C. Ann. § 3313.60(A)(5)(c).
[148] *Id.*
[149] O.R.C. Ann. § 3313.60(A)(5)(d).
[150] *Id.*
[151] *Id.*

children not to receive. Parents may opt their children out of suicide awareness and prevention, safety training and violence prevention, social inclusion instruction, and first aid (cardiopulmonary resuscitation).[152] In order for parents to opt out of any of these areas of instruction, they must first provide written notice to the school or other applicable governing authority.[153]

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

In Ohio, parents may object to their children receiving medical examinations. If parents object to the board of health providing a medical examination for their child, that child is not required to receive the medical examination.[154] Parents may also object to their children receiving any dental examination or treatment by a school dentist.[155] Some boards of education may require various tests by the school physician, such as an examination for tuberculosis.[156] Similarly, there are exemptions available for parents who can provide a written statement from a physician showing that the student is free from tuberculosis, or the test for tuberculosis is not advisable due to medical reasons, or the parent(s) object due to religious convictions.[157]

There are also multiple exemptions available for parents who do not want their children to receive the required immunizations to attend school.[158] Exemptions are available for students who have naturally had rubeola, mumps, and chicken pox.[159] Parents or the child's physician may provide a written

[152] O.R.C. §§ 3313.60(A)(5)(d); O.R.C. 3313.60(A)(5)(h); O.R.C. 3313.60(A)(5)(i); O.R.C. 3313.60(8).
[153] *Id.*
[154] O.R.C. § 3313.73.
[155] O.R.C. § 3313.68.
[156] O.R.C. § 3313.71.
[157] *Id.*
[158] O.R.C. § 3313.671.
[159] O.R.C. § 3313.671(B)(1)-(3).

statement that the child is exempt from these vaccines if the child naturally already had the illnesses.[160]

There are also exemptions for students whose physicians have certified that the immunization is "medically contraindicated."[161] In other words, if the student's physician has determined that the child should not receive the immunization due to medical reasons, that child is exempt and not required to receive the vaccine.[162] Finally, there is an exemption for parents who object to the immunization due to matters of conscience, including religious convictions.[163] If parents wish for their children to be exempt from immunization, they must provide a written statement with the reason behind the exemption.[164]

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

The rules for immunization exemptions for postsecondary institutions are fewer and further between than they are for K-12 schools. The only government-mandated immunizations for any postsecondary institutions are found in O.R.C. Ann. §§ 3345.85; 1713.55; 3332.25.; they mandate that an enrolled individual who will be residing in on-campus housing shall provide documentation of vaccinations against meningococcal meningitis and hepatitis B.

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;[165] this statute has not been applied in the context of religious exemptions to immunization requirements.

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[160] *Id.*
[161] O.R.C. § 3313.671(B)(5).
[162] *Id.*
[163] O.R.C. § 3313.671(B)(4).
[164] O.R.C. § 3313.671.
[165] 42 U.S.C. § 2000c et. seq.

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

A. Ohio Law

One survey provided to students in Ohio is the body mass index and weight screening.[166] The result of each student's individual screening is kept confidential and only provided to the student's parent or guardian.[167] According to Ohio law, "The board or governing authority shall notify the parent or guardian of each student screened under this section of any health risks associated with the student's results and shall provide the parent or guardian with information about appropriately addressing the risks."[168] A parent may opt their child out of this screening by providing a written statement to the board or governing authority.[169]

Also, as aforementioned, Ohio law provides parents with the right to promptly review upon request and regarding the parent's own child:

> (1) Any survey or questionnaire, prior to its administration to the child; (2) Any textbook, workbook, software, video, or other instructional materials being used by the district in connection with the instruction of the child; (3) Any completed and graded test taken or survey or questionnaire filled out by the child; (4) Copies of the statewide academic standards and each model curriculum developed pursuant to section 3301.079 of the Revised Code, which copies shall be available all times during school hours in each district school building.[170]

[166] O.R.C. Ann. § 3313.674.
[167] O.R.C. Ann. § 3313.674(F).
[168] O.R.C. Ann. § 3313.674(E).
[169] O.R.C. Ann. § 3313.674(D).
[170] O.R.C. Ann. § 3313.60(G)(1)-(4).

In Ohio, there are multiple surveys that may be provided to students. Student participation in these surveys is voluntary. Some of the surveys include:

1. **Youth Risk Behavior Survey (YRBS):** This survey nationwide and is led by the U.S. Centers for Disease Control (CDC).[171] Parental permission procedures are followed with this survey, and the results are anonymous.[172] The topics included 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 inactivity.[173] There is no Ohio statute authorizing this survey to be found.

2. **Ohio Youth Tobacco Survey**: "The Ohio Youth Tobacco Survey (OYTS) is a voluntary statewide survey that collects information on tobacco use and risk factors among Ohio teens in grades 6 through 12."[174] There is no Ohio statute authorizing this survey.

3. **Dayton Area Drug Survey (DADS)**: It is a "biennial, cross-sectional study that provides estimates of non-medical drug use by school-aged teenagers in the Dayton, Ohio, area."[175] The

[171] https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/Youth-Risk-Behavior-Survey/welcome;
https://odh.ohio.gov/wps/wcm/connect/gov/efb12a3e-abd9-4144-af46-e817bf178274/2019OHH+Survey+Summary.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-efb12a3e-abd9-4144-af46-e817bf178274-n1vgpVh.
[172] https://odh.ohio.gov/wps/wcm/connect/gov/efb12a3e-abd9-4144-af46-e817bf178274/2019OHH+Survey+Summary.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-efb12a3e-abd9-4144-af46-e817bf178274-n1vgpVh.
[173] https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/Youth-Risk-Behavior-Survey/welcome.
[174] https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/tobacco-use-prevention-and-cessation/data/data.
[175] https://medicine.wright.edu/citar/dayton-area-drug-survey.

surveys are anonymous and voluntary.[176] There is no Ohio statute authorizing this survey.

B. Federal Law

Under the Protection of Pupil Rights Amendment ("PPRA")[177] 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).[178]

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[176] *Id.*

[177] 20 U.S.C. §1232h.

[178] 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).

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 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.[179]

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.[180]

XII. The Pledge of Allegiance

In Ohio, a teacher may have students recite the Pledge of Allegiance in the classroom. However, a student shall not be required to recite the Pledge of Allegiance.[181] Further, the teacher must prohibit any intimidation by other students or staff members that might coerce participation.[182]

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[179] 20 U.S.C. § 1232h(c)(2)(B)-(C).
[180] 20 U.S.C. § 1232h(c)(6)(B).
[181] O.R.C. Ann. § 3313.602(A).
[182] *Id.*

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.

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