# Public Education: Religious Rights and Values in New York 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

Students of public schools and public universities may express religious opinions in their coursework and extracurricular activities, as long as the school does not take an official position for or against religion or a religious issue. "A neutral forum by definition provides place or space for contention on controversial issues. If religious issues fall within that purview they may not be excluded as unmentionable, so long as the provider of the forum maintains its strict neutrality."[1]

### A. Religious opinions expressed by students in coursework.

A student may express an opinion that has religious significance, or criticize religious ideas, for example, in a student newspaper at a public college, because controversial issues of the day sometimes concern issues that touch on religion. However, the school, as the forum for debates on relevant issues, must remain "neutral."[2] It would be a sad day when only in private colleges legitimate controversies engendered by religion could be the subject of study and discussion."[3]

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

There is no law stating that a student may not pray at school outside of instructional hours. Additionally, teachers may pray, alone or with other teachers, at their own initiative and

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[1] *Panarella v. Birenbaum*, 32 N.Y.2d 108, 116 (1973).
[2] *Id*.
[3] *Id*. at 118.

outside of instructional hours on campus.[4] There is even an argument that a school official may be permitted to offer a prayer at a graduation ceremony if he is speaking on his own behalf, privately, and not on behalf of the school.[5] However, that argument has more power in places other than the state of New York.

### C. Religious student speakers

A school, as a limited public forum, must give equal treatment to all students and activities, and may not discriminate based on viewpoint.[6] For example, where a school had in the past allowed various Christian worship concerts to take place in its cafeteria, the school was required to allow a similar worship and preaching event to take place after-school hours.[7] Even unpopular and controversial figures must not be discriminated against solely based on viewpoint.[8]

A school hosting a panel discussion-type event where various sides of an opinion are expressed must not exclude certain viewpoints it does not agree with. For example, a school that hosted a panel discussion on homosexuality was required to represent all perspectives on the topic, including the Christian view that homosexuality is sinful, because a student requested that the Christian perspective be represented alongside the other viewpoints.[9]

Beyond granting equal protection to all people regardless of creed, New York law specifically provides for the

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[4] *Eder v. City of New York*, No. 06 CIV. 13013, 2009 WL 362706 (S.D.N.Y. Feb. 12, 2009) [not reported].
[5] *Doe ex rel. Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605 (8th Cir. 2003).
[6] *Liberty Christian Ctr., Inc. v. Bd. of Educ. of City Sch. Dist. of City of Watertown*, 8 F. Supp. 2d 176 (N.D.N.Y. 1998).
[7] *Id*.
[8] *Egan v. Moore*, 20 A.D.2d 150, 245 N.Y.S.2d 622 (1963), *aff'd*, 14 N.Y.2d 775, 199 N.E.2d 842 (1964).
[9] *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780 (E.D. Mich. 2003).

use of school facilities by the community for various gatherings that are open to the general public.[10] Gatherings include gatherings for educational, recreational, or entertainment purposes.[11] Individual school boards are responsible for articulating the law allowing use of the school grounds after-hours, and some boards have been very liberal, even allowing Christian worship concert fundraisers, as touched on above.[12]

### D. Clothing

A student may express his views, either directly or symbolically, through his clothing and accessories.[13] Freedom of expression and freedom of speech protects the right of students to express their beliefs.[14] Whether their beliefs are religious or not is irrelevant; they are free to use clothing to speak their minds.[15] For example, a student protesting the Vietnam War was allowed to wear a black armband to symbolize his disagreement with it.[16] In another case, a school tried to prevent a student from wearing a red, white and blue-colored necklace because the school claimed it could possibly be a criminal gang symbol. However, the student claimed that she wanted to wear the necklace to show her support for American soldiers fighting in Iraq. The court found that her freedom of speech was being violated by the school in not

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[10] N.Y. Educ. Law § 414 (McKinney).
[11] *Id*.
[12] *Liberty Christian Ctr., Inc. v. Bd. of Educ. of City Sch. Dist. of City of Watertown*, 8 F. Supp. 2d 176, 183–84 (N.D.N.Y. 1998).
[13] *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006).
[14] *Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139 (N.D.N.Y. 2006).
[15] *Id.* (endorsing generally freedom of expression via for students at public school, including expressive conduct, which, in this case, included the wearing of a red, white, and blue necklace by the student who wanted to express her support for Americans fighting in Iraq).
[16] *James v. Bd. of Ed. of Cent. Dist. No. 1 of Towns of Addison et al.*, 461 F.2d 566 (2d Cir. 1972).

allowing her to wear the necklace because the necklace was expressing a message that other people would be likely to understand—her patriotism.[17]

### E. Employment discrimination

New York school districts are bound by the federal requirements in Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against an employee on the basis of religion.[18]

## II. Equal access to school facilities

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

### A. The Equal Access Act

The federal Equal Access Act ("EAA")[19] provides that it is "unlawful for any ***public secondary school*** which receives federal financial assistance and which has a ***limited open forum*** to deny equal access…to…any students who wish to conduct a meeting within that limited open forum on the basis of the religious…content of the speech at such meetings."[20] 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."[21]

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[17] *Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139 (N.D.N.Y. 2006).
[18] 42 U.S.C.A. § 2000e, *et seq*. (West).
[19] 20 U.S.C. §§ 4071-7074.
[20] 20 U.S.C. § 4071(a) (emphasis added).
[21] 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).

The EAA does not violate the Establishment Clause of the U.S. Constitution's First Amendment.[22] 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.[23]

### 1. The EAA's terms

The three most important terms in the EAA are "meeting," "noninstructional time," and "noncurriculum related student group." Meetings include those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

Meetings (1) must be voluntary and student-initiated; (2) must be without sponsorship from the school, the government, or its agents or employees; (3) any presence of employees or agents of the school or government must be 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.[24]

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[22] *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).

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

[24] 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).

"Noninstructional time" means "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[25] In a seminal case, a court defined "noninstructional time" to include meetings during lunch time and found that a school violated a students' rights in denying her religious club the opportunity to meet during lunch as other clubs were allowed to.[26] 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.[27] 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.[28] Other federal courts have come to the same conclusion concerning noninstructional lunch periods.[29]

A "noncurriculum study group" is "any student group that does not directly relate to the body of courses offered by the

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[25] 20 U.S.C. § 4072(4); *See also*, *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211(3rd 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).

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

[27] *Id.* at 881.

[28] *Id.*

[29] *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).

school."[30] 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."[31]

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.[32]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.[33] Simply because particular student clubs might advance the "overall goal of developing effective citizens . . . enable[ing] students to develop lifelong recreational interests . . . [and] enhance[ing] students' abilities to engage in critical thought processes," does not make them sufficiently related to a school's curriculum so that application of the EAA may be avoided.[34]

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[30] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 239 (1990).
[31] *Id*. at 239-240; *Straights & Gays for Equality v. Osseo Area Schs*., 471 F.3d 908 (8th Cir. 2006).
[32] *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).
[33] *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).
[34] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 244 (1990).

### 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."[35] 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.[36] 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."[37]

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."[38] 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.[39]

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[35] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001).
[36] *Id*. at 111.
[37] *Id*. at 114.
[38] *Id*. at 115.
[39] *Id*. at 118.

### 3. Religious films in public secondary schools

In another Supreme Court case, a private religious group wanted to use school grounds to present religious films.[40] 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.[41]

### 4. Advertising religious activities

Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.[42] If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.[43]

Finally, elected officials and school employees are free to attend such services in their capacities as private citizens. "A school district may not prevent school personnel from participating in religious activities on school grounds that are initiated by students at reasonable times before or after the school day if such activities are voluntary and do not conflict with the responsibilities or assignments of such personnel."[44] 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.[45]

## B. New York law

Although New York does not have a statutory scheme similar to the EAA that applies to elementary school, the

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[40] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993).
[41] *Id*. at 395.
[42] *Hills v. Scottsdale Unified Sch. Dist*., 329 F.3d 1044, 1055 (9th Cir. 2003); *Gilio v. Sch. Bd.*, 905 F. Supp. 2d 1262, 1274 at n. 23 (M.D. Fla. 2012).
[43] *Id.*
[44] F.S. § 1002.206(4)(b)(1).
[45] *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)).

Constitution protects the rights of all citizens, regardless of age. Courts generally are more fearful of violating the Establishment Clause in elementary schools than in secondary schools, because younger children are more impressionable. But there is legal support for the principle that elementary schools, just like secondary schools, must provide equal access to all groups, regardless of creed. For example, in one elementary school in the Third Circuit, the staff distributed flyers for various community programs that were not sponsored by the school (e.g. Girl Scouts, Lions Club, PTA, etc.).[46] The school refused, however, to distribute flyers for the "Good News Club," a community program where children were taught Bible stories and verses and how to apply biblical wisdom to their lives. The school was found to be in violation of the Constitution, because it was discriminating based on viewpoint. The school could not justify its actions by invoking a desire to comply with the Establishment Clause. The school was acting illegally because it treated the one community program differently because it was a religious Christian club.[47]

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

## III. Right to start religious 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.

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[46] *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 536 (3rd Cir. 2004).
[47] *Id.*

Contrary to popular belief, the U.S. Supreme Court has never insisted that there be an impenetrable wall between church and state.[48] 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.[49] 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."[50]

As a matter of law, the Constitution "affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any."[51] Therefore, limiting the existence or religious expression of a religious club based on a fear of violating "the separation of church and state" is clearly mislaid. 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.[52] 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.[53] 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

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[48] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).
[49] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).
[50] *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984).
[51] *Id.* (internal citations omitted) (emphasis added).
[52] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968).
[53] *Id.* at 506.

absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[54]

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."[55] 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.[56] Such discrimination necessarily amounts to an unconstitutional act of state sponsored hostility toward religion.[57] 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.[58]

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.[59] The Act generally provides that "[i]t shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open

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[54] *Id.* at 511.
[55] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).
[56] *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).
[57] *See, generally, Lynch v. Donnelly*, 465 U.S. 668 (1984).
[58] *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 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."].
[59] 20 U.S.C. § 4071 (2004).

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 noncurriculum groups to meet on campus, a faith-based group must be afforded the equal access.

It is also important to note that a religious club on a public school campus has the right to require that some of its officers (e.g. president, vice president, and music coordinator) be members of the club's religion.[60] A Second Circuit case from New York affirmed that the right of a Christian club on a high school campus to mandate that some of its key leaders be Christian is essential to the free religious expression of the club members, and does not violate the Establishment Clause of the Constitution, or the school's obligation to be non-discriminatory.[61]

## IV. Right to share 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.[62] This means that students can share their faith when they are outside of class.[63] Student speech can only be restricted when it substantially interferes with school discipline.[64] Interference, however, does not include some students finding the speech offensive; mere discomfort at the subject matter is not sufficient to restrict student speech.[65] Finally, speech in a

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[60] *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 872, 873 (2nd Cir. 1996).
[61] *Id.*
[62] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1968).
[63] *Id.* at 503.
[64] *Id.* at 508-09.
[65] *Id.* at 509.

limited public forum may only be subject to viewpoint-neutral limitations.[66]

### 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.[67] Students can also use religious tracts when they share their faith because tracts and other evangelistic materials constitute constitutionally protected speech.[68] As such, the First Amendment protects a student's right to distribute religious materials on campus.[69] 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."[70]

In fact, a school cannot even require students to give advance notice when they plan to pass out religious tracts.[71] Schools also lack the power to restrict students to a certain area when passing out religious tracts, unless the students are disrupting school discipline.[72]

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[66] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).
[67] *Rivera v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989).
[68] *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).
[69] *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).
[70] *Rivera,*721 F. Supp. 1189.
[71] *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).
[72] *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994).

Finally, it should be noted that school authorities cannot censor student publications unless they can reasonably forecast that the expression will cause a substantial disruption of school activities or will invade the rights of others.[73] 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.[74] 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 Federal Constitution.[75]

### B. Right to speak during non-instruction 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.[76] Because they are agencies of the government, public schools can only impose viewpoint-neutral limitations on

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[73] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 514 (1968).
[74] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).
[75] *Id.*
[76] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Prince v. Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002) ("While the school is certainly permitted to maintain order and discipline in the school hallways and classrooms by limiting the number and manner of both printed and oral announcements for all student groups, 20 U.S.C. § 4071(f), it may not discriminate among students based on the religious content of [their] expression.").

students.[29] If a school allows any club to put on skits or lunchtime presentations, then the school must also allow students who want to put on religious skits or lunchtime presentations to do so as well.

## V. Right to pray on campus

A student has the right to engage in personal prayer on a public school campus.[77] 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.[78] 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.[79] 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*.[80] Indeed, students can gather and pray on school property *before the school day officially begins*.[81] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[82]

Equal protection prohibits public schools from discriminating against religious expression. A student may pray or engage in religious activities or religious expression before, during, and after the school day in the same manner and to the same extent

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[77] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2001), *cert. denied,* 533 U.S. 916 (2001). *But see*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000); contrast with the dissent in the same case.
[78] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1968).
[79] *Chandler v. Siegelman*, 230 F. 3d 1313, 1317 (11th Cir. 2001).
[80] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).
[81] *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 589-590 (N.D. Miss. 1996).
[82] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1968).

that a student may engage in secular activities or expression. A student may organize prayer groups, religious clubs, and other religious gatherings before, during, and after the school day in the same manner and to the same extent that a student is permitted to organize secular activities and groups.[83]

School board districts may set aside a brief time of silence at the beginning of a school day or school week.[84] Students may use this time to pray or meditate, or simply to sit silently.[85] School officials may neither encourage nor discourage students from praying during such times;[86] however, there is no illegality in the school officials clarifying to students that the period of silence "may" be used for prayer.[87]

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

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[83] *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 248 (1990) (explaining that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities" (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978)) (BRENNAN, J., concurring in judgment)).

[84] *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 504 (7th Cir. 2010).

[85] *Id.*

[86] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2001), *cert. denied,* 533 U.S. 916 (2001). In *Chandler*, the court ruled that students are allowed to take part in group prayers at school functions. The court reviewed a lower court's injunction against the enforcement of an Alabama statute permitting student-initiated prayer at school-related events. Finding that the injunction wrongly assumed that any religious speech in schools is attributable to the State, the appellate court held that the injunction was overbroad and found that as long as the speech was truly student-initiated and not the product of school policy which encourages it, the speech is private and protected.

[87] *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 520 (7th Cir. 2010).

## VI. Right to take religious texts to school

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

The New York Constitution and the First Amendment to the United States Constitution ensure the right to free speech, which includes the right of religious expression.[88] School officials must recognize students' constitutional rights in the school setting.[89] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[90] 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.[91]

If students are allowed to attend such lunchtime religious meetings under the Equal Access Act, then they are allowed to take religious texts to school and read them during other non-curricular times of the day (recess, free time, etc.). This is consistent with the rule that if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[92]

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[88] U.S. Const. amend. I; N.Y. Const. art. I, §§ 3, 8; *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).
[89] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1968).
[90] *Id.* at 512-13.
[91] *Id.* at 509.
[92] *Id.* at 509.

### 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."[93] Thus, the school is able to exercise some discretion in order to avoid the appearance that it is endorsing a particular religion.[94]

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 literature.[95] Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.[96]

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[93] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).
[94] *Id.* at 271; *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991).
[95] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).
[96] *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).

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.[97] 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.[98] Public schools may not prohibit the Bible's presence or use in the classroom when "the Bible serves as a secular educational reference, is related to an approved curriculum, or is read in such a manner that students are insulated from undue religious influence or indoctrination."[99] 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.[100]

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[97] *Widmar v. Vincent*, 454 U.S. 263 (1981).

[98] *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *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).

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

[100] *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.*

## VII. Papers and speeches 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.[101]

At least one federal court has touched on the issue of whether a student may submit coursework that expresses religious beliefs, and it was supportive of the proposition.[102] For example, a student censored during a "business fair" from selling a product with a card with a religious anecdote attached was found to have had his free speech rights violated.[103]

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[101] 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 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 January 16, 2020.]

[102] *Curry ex rel. Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723, 735 (E.D. Mich. 2006), *aff'd on other grounds sub nom*. *Curry ex rel. Curry v. Hensiner,* 513 F.3d 570 (6th Cir. 2008).

[103] *Id*.

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

## VIII. 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.[104] However, permitting students to independently decide whether to include religious messages in speeches delivered at such events is acceptable. In such cases, the student speaker must be free to deliver any message, whether it be sectarian, secular, or both.[105] New York law is silent on the right of students to decide the message in a speech given at a school event.

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

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

## IX. Acknowledgment and celebration of religious holidays

New York law has been somewhat silent on the issue of holiday celebrations at school, but it has recognized the right to celebrate religious holidays on school grounds in several cases. First, a nativity display on school grounds during a Christmas break period when no students would be present, and paid for by a third party, was completely permissible under the Establishment Clause.[106] Second, at least one school district in the state (the New York City School District) celebrates one Muslim holiday (Eid al-Fitr) and One Jewish holiday (Yom Kippur).[107]

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. Generally speaking, 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.[108]

Additionally, a school that put on an Earth Day celebration where it is arguable that worship of and prayer to the earth was

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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."

[106] *Lawrence v. Buchmueller*, 243 N.Y.S.2d 87, 90-91 (1963).

[107] https://www.schools.nyc.gov/about-us/news/2020-2021-school-year-calendar (last visited May 22, 2021) (listing public school holidays for the 2020-21 school year).

[108] *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").

encouraged and endorsed by faculty was found consistent with the Establishment Clause of the Constitution.[109]

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. 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.[110] Religious symbols alongside secular symbols send the secular message of inclusion and the freedom of one to choose his or her own beliefs.

## X. Release time

A release time program is one where public school students are dismissed from their regular classes and receive instruction from someone other than school personnel. Instructors from outside the public school system can conduct topical lessons on religious themes. New York law authorizing a student's absence for religious instruction[111] has been reviewed in the federal courts, and has been upheld as constitutional.[112] "Absence for religious

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[109] *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2nd Cir. 2001).

[110] *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).

[112] *Pierce ex rel. Pierce v. Sullivan W. Cent. Sch. Dist.,* 379 F.3d 56, 61 (2nd Cir. 2004).

observance and education shall be permitted under rules that the commissioner shall establish."[113] Rules established by the commissioner require that parents to request the absence in writing, the religious course shall be taught by a religious body, the students' attendance shall be recorded, and the absence is usually limited to only one hour per week, among other requirements.[114] Consult the school district's policy on "release time" programs.

Furthermore, all release time programs must comply with the restrictions that the U.S. Supreme Court placed on them in *Illinois ex rel. McCollum v. Bd. of Education*[115] and *Zorach v. Clauson*,[116] and lower federal courts have built upon those cases. 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;
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.[117]

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[113] N.Y. Educ. Law § 3210 (McKinney).
[114] N.Y. Comp. Codes R. & Regs. tit. 8, § 109.2.
[115] *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948). "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/.
[116] *Zorach v. Clauson*, 343 U.S. 306 (1952).
[117] *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/;

Schools can choose to allow release time classes to satisfy elective credits as long as the policy is neutrally stated and administered.[118] 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

New York law provides religious accommodations for students in both public and private colleges and universities, provided that they are not religious institutions whose purpose is to propagate religious doctrines.[119] Specifically, the accommodations allowed revolve around providing make-up days for work or exams missed by students observing religious holy days.[120] The law requires a good-faith effort on the part of the educational institution to comply with its provisions, prohibits retaliation against students who exercise their rights under this law, and provides a civil cause of action for students aggrieved by the failure of a university to comply with this law.[121]

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https://releasedtime.org/florida#:~:text=Florida%20is%20one%20of%20several,school%20district%20in%20the%20state.

[118] *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).

[119] N.Y. Educ. Law § 224-a (McKinney).

[120] *Id.*

[121] *Id.*

# PART II: PARENTS' RIGHTS

## I. Constitutional rights of parents under the U.S. and New York constitutions

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."[122] The U.S. Supreme Court has recognized that the Due Process Clause guarantees more than simply fair process. The Due Process Clause contains an additional component that provides a heightened level of protection against any government interference when certain fundamental rights and liberty interests are involved.

In *Troxel v. Granville*, a case to determine the scope of grandparent visitation rights when pitted against a parent's rights, the Court noted that the Fourteenth Amendment "liberty interest" at issue—the interest that parents had in the care, custody, and control over their children—was perhaps the oldest of any fundamental liberty interest that the Court had recognized.[123]

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."[124] 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.[125] In 1944, the Court affirmed the right of parents to direct the upbringing of their children when it stated, "It is cardinal with us

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[122] U.S. Const. amend. XIV.
[123] *Troxel v. Granville*, 530 U.S. 57 (2000).
[124] *Id.* at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).
[125] *Id.* at 65 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925)).

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."[126] 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."[127]

Similarly, New York courts agree that there is a serious liberty interest in parenting one's child. "The petitioners [parents] enjoy a well-recognized liberty interest in rearing and educating their children in accord with their own views . . . [i]ntrusion into the relationship between parent and child requires a showing of an overriding necessity."[128] In the quoted case, a public school distributing condoms to students without the parents' consent was found to be in violation of the parents' due process rights, depriving them of their liberty interest in making choices about their child's healthcare.[129] The court evaluated that the State did not have a "compelling state interest standard" to deprive parents of their rights to dictate their children's healthcare.[130]

## II. Access to student records and information

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

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[126] *Id.* at 65-66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).
[127] *Id.* at 66 (quoting *Parham v. J.R.* 442 U.S. 584, 602 (1979)).
[128] *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (1993).
[129] *Id.*; contrast with *Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.,* 978 F. Supp. 197, 210–11 (E.D. Pa. 1997), *aff'd*, 148 F.3d 260 (3rd Cir. 1998) (discussing a different perspective on the public school condom distribution issue).
[130] *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (1993).

and state law.[131] The major federal law covering the privacy of student records is the Family Educational Rights and Privacy Act ("FERPA").[132] The regulations implementing FERPA are 34 C.F.R. Part 99. New York recognizes a rebuttable presumption under common law allowing parents to inspect their children's student records.[133] Further, a parent has a statutory right to request a release of his child's records to his child.[134] Both FERPA and New York law describe obligations that school districts, state education agencies, and others acting for those entities have regarding the collection, processing, maintenance, quality, and disclosure of the information routinely collected and maintained. All education records about students, whether handwritten or computerized, are protected by the same regulations. These laws apply to public postsecondary institutions as well.[135]

The New York law refers to FERPA as to how a school district must handle parent or legal guardian requests for either student education records or amendments to the student school records after reviewing them.[136] Collectively, these laws give students and parents the right to:

1. Access students' education records, including the right to inspect and review those records.[137]
2. Waive their access to the students' education records in certain circumstances.[138]

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[131] Family Educational Rights and Privacy Act (20 U.S.C. § 1232g); N.Y. Educ. Law § 3222 (McKinney).
[132] 20 U.S.C. § 1232g.
[133] *See*, *Van Allen v. McCleary*, 211 N.Y.S.2d 501, 514 (1961) (explaining that absent any law or regulation to the contrary, a parent has a presumptive right to access his child's school records).
[134] N.Y. Educ. Law § 3222 (McKinney).
[135] N.Y. Educ. Law § 2-d (McKinney).
[136] 20 U.S.C. § 1232g.
[137] N.Y. Educ. Law § 2-d(4)(g).
[138] 20 U.S.C. § 1232g(a)(1)(D).

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.[139]
4. Of privacy with respect to such records and reports.[140]
5. Receive annual notice of their rights with respect to education records.[141]

Education records, as defined by FERPA and the federal regulations are confidential. An agency or institution may not release education records without the written consent of the student or parent to any individual, agency, or organization, except in accordance with and as permitted by FERPA.[142] One exception is for certain law enforcement purposes.[143]

### A. Other New York laws

Other New York laws give a parent of a K-12 student the right to:[144]

1. Have complaints about possible breaches of student data addressed.[145]
2. Inspect and review the complete contents of their child's educational records.[146]
3. Be notified by NYSED's Chief Privacy Officer regarding breaches.
4. Have the educational agency publish a parent's bill of rights on its website and include it in every contract with a

[139] 20 U.S.C. § 1232g(a)(2).
[140] 20 U.S.C. § 1232g(b)(4)(A).
[141] N.Y. Educ. Law § 2-d(2)(b)(7).
[142] 20 U.S.C. § 1232g(b)(2)(B).
[143] 20 U.S.C. § 1232g(j)(1).
[144] N.Y. Educ. Law § 2-d.
[145] N.Y. Educ. Law § 2-d(b)(5).
[146] N.Y. Educ. Law § 2-d(b)(2).

third-party contractor that received personally identifiable information.[147]

### B. Other federal laws

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

1. The Individuals with Disabilities Education Act (IDEA),[148] which applies to the education records covered by this law. However, IDEA release and disclosure requirements are substantially identical to those in FERPA.
2. The Health Insurance Portability and Accountability Act (HIPAA) of 1996 (104 P.L. 191), which provides privacy regulations to protect patients by limiting the ways that health plans, pharmacies, hospitals, and other covered entities can use patients' personal medical information. The Privacy Rule of the law, however, provides a broad exemption for personal health information maintained in education records, which is protected under FERPA.
3. The Drug and Alcohol Patient Records Confidentiality Law (42 CFR Part 2), which applies to the services and treatment of records belonging to students who receive assistance from 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).

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[147] http://www.nysed.gov/common/nysed/files/programs/data-privacy-security/fact-sheet-for-parents.pdf.
[148] 20 U.S.C. § 1400 *et seq*.

# PART III: EXEMPTIONS

## I. Parents can opt their children out of reproductive health education and disease education, but not from all types of comprehensive health education.

New York public schools are required to teach comprehensive ***health*** education.[149] Comprehensive health education ***may*** include instruction on AIDS.[150] Such education is designed to provide accurate information to students concerning the nature of AIDS, methods of transmission, and methods of prevention; this education shall also stress abstinence as the most appropriate and effective premarital protection against AIDS, and shall be age-appropriate and with community values.[151]

In K-6 and secondary schools, students are to be provided with appropriate instruction concerning AIDS as part of the sequential health education program for all students. No student, however, is required to receive instruction concerning the prevention of AIDS if the parent or legal guardian of such student has filed with the principal of the school which the student attends a written request that the student not participate in such instruction, with an assurance that the pupil will receive such instruction at home.

Comprehensive health education ***may, but need not, include sex education***. All students in grades 6-12 are required to have sexual health education as part of their comprehensive health education lessons. There is no required separate "sex ed" course in any grade. Sexual health education must be age appropriate, skills based, and medically accurate.

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[149] 8 N.Y. ADC § 135.3.
[150] 8 N.Y. ADC § 135.3I(2)(i).
[151] *Id*.

A school will send the parents or legal guardian a letter before sexual health education lessons begin in their child's health class. The parent or legal guardian may ask the school not to give lessons to their child about birth control and how to prevent HIV and sexually transmitted infections. The school will let the parents know about the opt-out process.[152]

Students ***must*** be exempted from the teaching of "reproductive health or any disease, including HIV/AIDS, its symptoms, development, and treatment" upon the written request by a parent to the school principal.[153] Note that the exemption ***does not apply to all types of comprehensive health education***, but only to education concerning reproductive health and diseases. Conceivably, this exemption covers sex education.

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

Education Law Article 19 and Regulations of the Commissioner of Education require physical examinations of public school students:

- Entering the school district for the first time, and in grades Pre-K or K, 1, 3, 5, 7, 9, and 11 and at any grade level by school administration, in their discretion to promote the educational interests of the student;[154]
- to participate in strenuous physical activity, such as interscholastic athletics;[155]
- upon student's request for an employment certificate;[156]

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[152] https://www.schools.nyc.gov/learning/subjects/health-education.
[153] 8 N.Y. ADC 135.3.
[154] 8 NYCRR § 136.3[b].
[155] 8 NYCRR § 135.4(c)(7)(i)(e) and § 136.3(a)(8).
[156] N.Y. Educ. Law § 3217.

- when conducting an initial evaluation or reevaluation of a student suspected of having a disability or a student with a disability.[157]

The school physical examination must be provided by the district medical director who is a physician or nurse practitioner licensed in New York State. The student must be separately and carefully examined.[158]

Parents of K-12 students, however, have the option to opt out of school-entry health examinations.[159] Unfortunately, parents of K-12 students may not opt out of the immunization requirements on the grounds of conflict with genuine and sincere religious beliefs.[160]

The N.Y. Education Law states that no examinations for a health certificate or health history shall be required or dental certificate requested, and no screening examinations for sickle cell anemia shall be required where a student or the parent or person in parental relation to such student objects thereto on the grounds that such examinations or health history conflict with their genuine and sincere religious beliefs.[161]

No examinations shall be required where a student or the parent or person in parental relation to such student objects thereto on the grounds that such examinations conflict with their genuine and sincere religious beliefs.[162]

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[157] 8 NYCRR § 200.4 [b].
[158] Education Law Article 19 § 904.
[159] N.Y. Educ. Law §§ 903, 904, 912-a, and 3204.
[160] N.Y. Educ. Law § 2164.
[161] N.Y. Educ. Law § 903(4).
[162] N.Y. Educ. Law § 904(2).

A student can be exempt from drug detection examinations on the grounds that such examinations conflict with their genuine and sincere religious beliefs.[163]

Subject to rules and regulations of the board of regents, a student may, consistent with the requirements of public education and public health, be excused from the study of health and hygiene if it conflicts with the religion of his parents or guardian.[164] A conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law.

Parents and guardians of K-12 students are required to vaccinate their children before the children were allowed to attend any school in New York. The only immunization exemption available to parents of K-12 students is a medical exemption.[165]

## III. Immunization exemptions are available in postsecondary institutions of education.

The rules for immunization exemptions are fewer and further between than they are for K-12 schools. Postsecondary institutions have almost complete control over their immunization requirements.[166]

The NYSDOH Immunization Program has the legal authority to ensure that schools throughout the state comply with

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[163] N.Y. Educ. Law § 912-a.
[164] N.Y. Educ. Law § 3204.
[165] N.Y. Educ. Law § 2164.
[166] The laws governing postsecondary institution immunization requirements in New York are Public Health Law § 2165 (measles, mumps and rubella), PHL § 2167 (meningococcal disease), and Title 10 New York Codes, Rules and Regulations Subpart 66-2 (10 NYCRR Subpart 66-2).

rules for immunization.[167] "No institution shall permit any student to attend such institution in excess of thirty days without complying with subdivision two of this section. However, such thirty day period may be extended to not more than forty-five days for a student where such student is from out-of-state or from another country and can show a good faith effort to provide a certificate of immunization."[168]

Postsecondary institutions are required to distribute information about meningococcal disease and immunization to the students, or parents or guardians of students under the age of 18, accompanied by a response form.[169] Postsecondary institutions are required to maintain appropriate documentation for each student. Acceptable documentation includes *any* of the following:

1. A vaccine record indicating at least 1 dose of meningococcal ACWY vaccine within the last 5 years or a complete 2- or 3-dose series of MenB without a response form; or
2. A signed response form with a vaccine record (If a student submits a response form selecting this option, a vaccine record must be attached); or
3. A signed response form indicating that the student will obtain meningococcal vaccine within 30 days; or
4. A signed response form indicating that the student will not obtain immunization against meningococcal disease.
5. If the student has not received meningococcal vaccine within the past 5 years, then he/she must submit the signed response form.[170]

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[167] PHL § 206.
[168] PHL § 2165;
https://www.health.ny.gov/prevention/immunization/handbook/section_1_requirements.htm.
[169] PHL § 2167.
[170] *Id*.

Students who met the requirements for PHL § 2167 in a semester/trimester prior to Spring 2017 are "grandfathered in" and do not need to resubmit their vaccine record or their response form.[171]

"No institution shall permit any student to attend the institution in excess of thirty days without complying with this section: provided, however, that such thirty day period may be extended to not more than sixty days if a student can show a good faith effort to comply with this section."[172]

Findings of violations of immunization rules may result in the imposition of a civil penalty of up to $2,000 per each student who is permitted to attend school in violation of these requirements.[173]

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[174] which prohibits discrimination based on religion in ***public*** education.

A student may be exempted from postsecondary education immunization requirements if they can present a valid medical or religious exemption. If a licensed physician or nurse practitioner, or licensed midwife caring for a pregnant student certifies in writing that the student has a health condition, which is a valid contraindication to receiving a specific vaccine, then a permanent or temporary exemption may be granted. This statement must

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[171] *Id*.
[172] PHL § 2165(7).
[173] https://www.health.ny.gov/prevention/immunization/handbook/section_1_requirements.htm.
[174] 42 U.S.C. § 2000c *et. seq*.

specify those immunizations which may be detrimental and the length of time they may be detrimental. Provisions need to be made to review records of temporarily exempted persons periodically to see if contraindications still exist. In the event of an outbreak, medically exempt individuals should be protected from exposure. This may include exclusion from classes or campus.[175]

A student may be exempt from vaccination if, in the opinion of the institution, that student or student's parent(s) or guardian of those less than 18 years old holds genuine and sincere religious beliefs which are contrary to the practice of immunization. The student requesting exemption may or may not be a member of an established religious organization. Requests for exemptions must be written and signed by the student if 18 years of age or older, or parent(s), or guardian if under the age of 18. The institution may require supporting documents. It is not required that a religious exemption statement be notarized. In the event of an outbreak, religious exempt individuals should be protected from exposure. This may include exclusion from classes or campus.[176]

## IV. Parents may not exempt their K-12 children from New York's immunization registry.

As of January 1, 2008, the New York State Legislature passed the Immunization Registry Law, which requires "healthcare providers to report all immunizations administered to persons less than 19 years of age, along with the person's immunization histories, to the NYS Department of Health using the New York State Immunization Information System (NYSIIS)."[177]

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[175] *Id*.
[176] *Id*.
[177] https://www.health.ny.gov/prevention/immunization/information_system/.

Participation in the Citywide Immunization Registry is voluntary for people over the age of 19; therefore, any immunizations received after 18 years of age will not be included unless consent is given.[178]

## V. Contraceptives in K-12 public schools

Boards of education or trustees may make condoms available to students as part of a district's AIDS instruction program.[179] New York City high schools offer the Condom Availability Program, where students in grades 9-12 can to go to the school's health resource room to request free condoms, information about HIV/AIDS, information about reproductive health and other health topics, referrals to health clinics and services in the neighborhood, and information about how to get tested for sexually transmitted infections.[180]

When a child is enrolled in high school, the school principal must give the child's parents a letter about the Condom Availability Program. The letter explains what the parents can do if they do not want their adolescent child to get condoms at school. Under state law, all students have the right to get information and referrals to health services.[181]

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[178] https://www1.nyc.gov/assets/doh/downloads/pdf/cir/consent103mr_1.pdf.
[179] N.Y. Commissioner's Regulations § 135.3(c)(2-ii).
[180] https://www.schools.nyc.gov/school-life/health-and-wellness/condom-availability-program.
[181] *Id*.

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

### A. New York law

School districts shall not report a student's juvenile delinquency records, criminal records, medical and health records, and student biometric information.[182] Biometric information act as identifiers, such as a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.[183]

Unfortunately, the reach of this law is limited. The NYS Center for School Health, in conjunction with the Center for Disease Control's Youth Risk Behavior Survey (YRBS), monitors health risk behavior in students in several categories, including weight and diet, physical activity, injury and violence, tobacco use, alcohol, and other drug use, and sexual behaviors. The NYS Center for School Health utilizes other surveys:

1. NYSDOH Immunization Survey - Online School Assessment Survey (OSAS)
2. CDC School Health Profiles (SHP): The CDC School Health Profiles (Profiles) assess school health policies and practices in states, urban school districts, territories, and tribal governments. They are conducted every 2 years. Middle and high school principal and the lead health education teachers complete a self-administered questionnaire at each sampled school. In NYS, the NYSSHSC conducts this survey on behalf of the NY State Education Department. The CDC Profiles Website contains links to data, participation maps, questionnaires and rationales, fact sheets and presentations. Profiles monitors the status of school health and physical education

[182] N.Y. Educ. Law § 2-d(e).
[183] *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2nd Cir. 2017).

requirements and content; school health policies related to HIV infection/AIDS, tobacco-use prevention, and nutrition; asthma management activities; and family and community involvement in school health programs.[184]

3. Behavioral Risk Factor Surveillance System (BRFSS): The CDC BRFSS is a state-based system of health surveys that collects information on health risk behaviors, preventive health practices, and health care access related to chronic disease and injury. For many states, the BRFSS is the only available source of timely, accurate data on health-related behaviors, for adults 18 years of age and older. National and state-specific reports can be accessed here.
4. Global School-Based Student Health Survey
5. Morbidity and Mortality Data: The CDC publishes annual mortality data on the 10 leading causes of death in the United States by age, sex, race, and ethnicity in National Vital Statistics Reports.
6. School Health Policies and Practices Study
7. Youth Development Survey (YDS): a survey of 7th-12th grade students that is conducted by the New York State Office of Addiction Services and Supports (OASAS) at no cost to participating schools.
8. Youth Tobacco Survey (YTS): State and local health departments periodically conduct a YTS among a representative sample of high school students.[185]

**B. Federal Laws**

Under the Protection of Pupil Rights Amendment ("PPRA")[186] and 34 CFR § 98.1 *et seq*., no student shall be required to submit to a U.S.-Department-of-Education-funded-or-administered survey, analysis, or evaluation that reveals

[184] https://www.schoolhealthny.com/site/default.aspx?PageType=3&ModuleInstanceID=322&ViewID=7b97f7ed-8e5e-4120-848f-a8b4987d588f&RenderLoc=0&FlexDataID=660&PageID=234.
[185] https://www.schoolhealthny.com/domain/134.
[186] 20 U.S.C. § 1232h.

information concerning the following items (unless an exception in 20 U.S.C. § 1232h(c)(4) applies):

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), without the prior consent of the student (if the student is an adult or emancipated minor), or, in the case of an unemancipated minor, without the prior written consent of the parent.[187]

Furthermore, pursuant to the PPRA, no student shall be required to participate in the following U.S.-Department-of-Education-funded-or-administered *activities* 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

[187] 20 U.S.C. § 1232h(b); 34 CFR § 98.1 *et seq*. (clarifying that the PPRA applies to only U.S.-Department-of-Education-funded-or-administered programs).

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.[188]

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.[189]

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

Some parents may object to certain biological experiments on religious or other grounds. Any child attending a public or private K-12 school shall be exempt from performing the following biological experiments upon written request of the parent.[190] The written request need not cite a religious motivation.

Moreover, no school district, school principal, administrator, or teacher shall require or permit the performance of a lesson or experimental study on a live vertebrate animal in any such school or during any activity conducted under the auspices of such school whether or not the activity takes place on the premises of such school where such lesson or experimental study employs: (1) micro-organisms which cause disease in humans or animals, (2) ionizing radiation, (3) known cancer producing agents, (4) chemicals at toxic levels, (5) drugs producing pain or deformity, (6) severe extremes of temperature, (7) electric or other

[188] 20 U.S.C. § 1232h(c)(2)(B)-(C).
[189] 20 U.S.C. § 1232h(c)(6)(B).
[190] N.Y. Educ. Law § 809(4).

shock, (8) excessive noise, (9) noxious fumes, (10) exercise to exhaustion, (11) overcrowding, (12) paralysis by muscle relaxants or other means, (13) deprivation or excess of food, water, or other essential nutrients, (14) surgery or other invasive procedures, (15) other extreme stimuli, or (16) termination of life.[191]

## VIII. Athletics

Upon a school district's determination that a student shall not be permitted to participate in an athletic program by reason of a physical impairment, based on a medical examination conducted by the school physician, the student may commence a special proceeding in the supreme court pursuant to the provisions of article four of the civil practice law and rules to enjoin the school district from prohibiting his participation.[192]

[191] N.Y. Educ. Law § 809(5).
[192] N.Y. Educ. Law § 3208-a(1).

# 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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