Public Education: Religious Rights and Values in Texas 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 Texas Constitution both provide equal protection for students to express their religion in public schools. Texas Law states:

> A school district shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.[1]

The Texas Constitution states:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.[2]

[1] Tex. Educ. Code Ann. §§ 25.151-.156 (Vernon 2007).
[2] Tex. Const. art. I § 6.

A. Religious coursework

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Homework and classroom assignments must be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school district. Students may not be penalized or rewarded on account of the religious content of their work.[3]

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

"Students may organize prayer groups, religious clubs, 'see you at the pole' gatherings, or other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups. Religious groups must be given the same access to school facilities for assembling as is given to other noncurricular groups without discrimination based on the religious content of the students' expression. If student groups that meet for nonreligious activities are permitted to advertise or announce meetings of the groups, the school district may not discriminate against groups that meet for prayer or other religious speech. A school district may disclaim school sponsorship of noncurricular groups and events in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech."[4]

"A public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. A person may not require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity."[5]

[3] Tex. Educ. Code § 25.153.
[4] Tex. Educ. Code § 25.154.
[5] Tex. Educ. Code § 25.901.

"A school district may provide for a period of silence at the beginning of the first class of each school day during which a student may reflect or meditate."[6]

C. Clothing

In the school context, school administrators may regulate expressive conduct that is normally protected by the First Amendment Free speech clause using a content and viewpoint neutral regulation that satisfies the time, place, and manner test. As described above, such a regulation meets the standard only if (1) the regulation, like a dress code,[7] furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of student expression; and (3) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.

II. Equal access to school facilities

Federal and Texas law provide religious groups with equal access to school facilities as secular groups.

A. The Equal Access Act

The federal Equal Access Act ("EAA")[8] 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."[9]

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[6] Tex. Educ. Code §15.082.

[7] *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001); *see also, Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 503 (5th Cir. 2009) (upholding a school dress code that banned any message on student clothing).

[8] 20 U.S.C. §§ 4071-7074.

[9] 20 U.S.C. § 4071(a) (emphasis added).

A "limited open forum" is created "whenever such school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time."[10] The EAA does not violate the Establishment Clause of the U.S. Constitution's First Amendment.[11] 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.[12]

1. The EAA's terms

The three most important terms in the EAA are "meeting," "noninstructional time," and "non-curriculum 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."[13] 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 non-participatory capacity; (4) cannot materially and substantially interfere with the orderly conduct of educational

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[10] 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). *See also*, *Morgan v. Swanson*, 659 F.3d 359, 379 (5th Cir. 2011).

[11] *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).

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

[13] 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' non curriculum-related newspaper distribution, and (2) "meeting" conducted by students is not voluntary in true sense of word.).

activities within the school; and (5) cannot be directed, conducted, controlled, or regularly attended by non-school persons.[14]

"Noninstructional time" means "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[15] 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.[16] 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.[17] The court found that by permitting other non curriculum 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.[18] Other federal courts have come to the same conclusion concerning noninstructional lunch periods.[19]

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[14] 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 non-school 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). *See also, Caudillo ex rel. Caudillo v. Lubbock Independent School Dist.*, 2003 WL 22670934 (N.D. Tex. Nov. 10, 2003).

[15] 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 non-curriculum related group met and students were not allowed to leave.

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

[17] *Id.* at 881.

[18] *Id.*

[19] *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*

A "non curriculum related student group" is "any student group that does not directly relate to the body of courses offered by the school."[20] 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."[21] 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.[22]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.[23] 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.[24]

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

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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).

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

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

[22] *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).

[23] *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).

[24] *Mergens*, 496 U.S. at 244.

Bible lesson and memorizing scripture, and religious worship."[25] 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.[26] 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."[27]

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."[28] 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.[29]

3. Religious films in public secondary schools

In another U.S. Supreme Court case, a private religious group wanted to use school grounds to present religious films.[30] 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.[31]

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[25] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001). *See also, Morgan v. Swanson*, 659 F.3d 359, 403 (5th Cir. 2011).
[26] *Id*. at 111.
[27] *Id*. at 114.
[28] *Id*. at 115.
[29] *Id*. at 118.
[30] *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993). *See also, Pounds v. Katy Independent School Dist.*, 730 F. Supp. 2d 636, 655–456 (S.D. Tex. 2010).
[31] *Id*. at 395.

4. Advertising religious activities

Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.[32] If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.[33]

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.[34]

B. Texas law

A school district does not violate the Establishment Clause simply by permitting religious groups to use school facilities on the same terms as other groups. When opening facilities for religious use, a school must balance individuals' First Amendment free speech and freedom of association rights with the school's need to avoid an unconstitutional establishment of religion. A school balances these competing interests by granting access to religious groups to the same extent it grants access to other groups for purposes that fall within the scope of the school's limited public forum.[35]

For example, a school district violated the First Amendment by enacting a policy requiring higher fees from religious groups than from other community groups. The district had adopted a fee schedule applicable only to churches that

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[32] *Hills v. Scottsdale Unified Sch. Dist*., 329 F.3d 1044, 1055 (9th Cir. 2003). *See also*, *Matthews, on behalf of M.M. v. Kountze Independent School District*, 484 S.W.3d 416 (Tex. 2016) (Guzman, J., concurring).

[33] *Id.*

[34] *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)).

[35] *Moore v. City of Van*, 238 F. Supp. 2d 837 (E.D. Tex. 2003) (concluding that city violated First Amendment by excluding religious uses from open forum for facility use).

required progressively higher rental fees to discourage long-term use of school facilities.[36]

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.

Contrary to popular belief, the U.S. Supreme Court has never insisted that there be an impenetrable wall between church and state.[37] 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.[38] 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."[39]

As a matter of law, the Constitution "affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any."[40] 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

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[36] *Fairfax Covenant Church v. Fairfax Cnty. Sch. BD.*, 17 F.3d 703 (4th Cir. 1994). *See also, Resnick v. East Brunswick Twp. Bd. Of Educ.*, 389 A.2d 944 (N.J. 1978); *Wallace v. Washoe Cnty. Sch. Dist.*, 818 F. supp. 1346 (D. Nev. 1991) (both reasoning that religious groups should be allowed access on the same terms as other nonprofits groups). *But see, Pratt v. Arizona Bd. Of Regents*, 520 P2d. 514 (Ariz. 1974) (noting that permitting religious services on a permanent basis or for less than fair market rental fee would be unconstitutional). *See also, Campbell v. St. Tammany Parish School Bd.*, 231 F.3d 937 (C.A.5 2000) (Edith H. Jones, J., dissenting).

[37] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

[38] *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

[39] *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984). *See also, Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010).

[40] *Id.* (internal citations omitted) (emphasis added).

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.[41] 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.[42] 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."[43]

Religious speech also falls within the scope of the *Tinker* case. The U.S. 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."[44] 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.[45] Such discrimination necessarily amounts to an unconstitutional act of state sponsored

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[41] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968). *See also, Longoria Next Friend of M.L. v. San Benito Independent Consolidated School District*, 942 F.3d 258 (5th Cir. 2019); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009).

[42] *Id.* at 506.

[43] *Id.* at 511.

[44] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). *See also, Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, 821 (5th Cir. 1999).

[45] *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). *See also, Pounds v. Katy Independent School Dist.*, 730 F. Supp. 2d 636, 652 (S.D. Tex. 2010).

hostility toward religion.[46] 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.[47]

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.[48] The Act generally provides that, "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings." If the school allows any non-curriculum groups to meet on campus, a faith-based group must be afforded the equal access.

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.[49] This means that students can share their faith when they are outside of class.[50] Student speech can only be restricted when it substantially interferes with school discipline.[51] Interference, however, does not include some students finding the speech offensive; mere discomfort at the subject matter is not sufficient to restrict student speech.[52] Finally, speech in a

[46] *See, generally, Lynch*, 465 U.S. 668 (1984).
[47] *See, e.g., 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.").
[48] 20 U.S.C. § 4071 (2004).
[49] *Tinker*, 393 U.S. at 503 (1968).
[50] *Id.* at 503.
[51] *Id.* at 508-09.
[52] *Id.* at 509.

limited public forum may only be subject to viewpoint-neutral limitations.[53]

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.[54] Students can also use religious tracts when they share their faith because tracts and other evangelistic materials constitute constitutionally protected speech.[55] As such, the First Amendment protects a student's right to distribute religious materials on campus.[56] 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."[57] In fact, a school cannot even require students to give advance notice when they plan to pass out religious tracts.[58] Further, the Fifth Circuit has held that within an open limited public forum for distribution or posting of non-school materials, distribution or posting cannot be denied solely on the basis of religious content.[59] The Fifth Circuit granted the principal qualified immunity, but warned that, for future cases, the First Amendment right of students to distribute religious materials during noninstructional time when the distribution does not

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[53] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). *See also, Morgan v. Swanson*, 659 F.3d 359, 396 (5th Cir. 2011).
[54] *Rivera v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989). *See also, Clark v. Dallas Independent School Dost.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992).
[55] *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). *See also, Fernandes v. Limmer*, 663 F.2d 619, 623 (5th Cir. 1981).
[56] *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).
[57] *Rivera*, 721 F. Supp. at 1189.
[58] *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).
[59] *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011).

interfere with the work of the school or the rights of others is clearly established, and school employees who violate this right may not be protected by qualified immunity.[60] Moreover, religious materials can be distributed on the same terms as all other non-school materials. For example, "permitting an elementary student to distribute copies of her personal statement of faith to classmates during noninstructional time."[61]

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.[62] 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.[63] 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.[64]

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

If a school allows any student 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.[65] If a school allows any club to put on skits or

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[60] *Morgan v. Swanson*, 659 F. 3d 359 (5th Cir. 2011).
[61] *M.B. ex rel. Martin v Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117 (N.D.N.Y. 2007).
[62] *Tinker*, 393 U.S. at 514.
[63] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *see also*, *Curry v. Hensiner*, 513 F. 3d 570 (6th Cir. 2008). *See also, Morgan v. Swanson*, 659 F. 3d 359, 380 (5th Cir. 2011).
[64] *Id.*
[65] *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

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.[66] 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.[67] 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.[68] 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*.[69] Indeed, students can gather and pray on school property *before the school day officially begins*.[70] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[71]

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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."). *See also, Morgan*¸ 659 F.3d at 418.

[66] *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2001), *cert. denied*, 533 U.S. 916 (2001). *See also, Kountze Indep. Sch. Dist. v. Matthews*, 2017 Tex. App. LEXIS 9165 (Tex. App. Sep. 28, 2017).

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

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

[69] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). *See also, Morgan*¸659 F.3d at 409.

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

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

Equal protection prohibits public schools from discriminating against religious expression. According to the applicable statute, "[s]tudents may organize prayer groups, religious clubs, 'see you at the pole' gatherings, or other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups. Religious groups must be given the same access to school facilities for assembling as is given to other noncurricular groups without discrimination based on the religious content of the students' expression. If student groups that meet for nonreligious activities are permitted to advertise or announce meetings of the groups, the school district may not discriminate against groups that meet for prayer or other religious speech. A school district may disclaim school sponsorship of noncurricular groups and events in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech."[72]

VI. Right to take religious texts to school

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

The Texas Constitution and the First Amendment to the U.S. Constitution ensure the right to free speech, which includes the right of religious expression.[73] School officials must recognize students' constitutional rights in the school setting.[74] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[75] 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

[72] Tex. Educ. Code § 25.154.
[73] U.S. Const. amend. I; Tex. Const. art. I, § 11; *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). *See also, Pounds v. Katy Independent School Dist.*, 730 F. Supp. 2d 636, 655 (S.D. Tex. 2010).
[74] *Tinker*, 393 U.S. at 506.
[75] *Tinker*, 393 U.S. at 512-13.

interferes" with the operation of the school or invades the rights of others.[76]

If students are allowed to attend such lunchtime religious meetings under the Equal Access Act (see above), then they are allowed to take religious texts to school and read them during other non-curricular times of the day (recess, free time, etc.). This is consistent with the rule that if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[77]

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."[78] Thus, the school is able to exercise some discretion in order to avoid the appearance that it is endorsing a particular religion.[79]

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

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[76] *Id.* at 509.
[77] *Tinker*, 393 U.S. at 509.
[78] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). *See also, Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 443 (5th Cir. 2001).
[79] *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).

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.[80] Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.[81]

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.[82] 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.[83] 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.[84]

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[80] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). *See also, Doe ex rel. Doe v. Beaumont Independent School Dist.*, 173 F.3d 274, 295 (5th Cir. 1999).

[81] *Zorach v. Clauson*, 343 U.S. 308, 314 (1952). *See also, McRaney v. North American Mission Board of Southern Baptist Convention*, 980 F.3d 1066, 1073 (5th Cir. 2020).

[82] *Widmar v. Vincent*, 454 U.S. 263 (1981). *See also, Pounds v. Katy Independent School Dist.*, 730 F. Supp. 2d 636, 653 (S.D. Tex. 2010).

[83] *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).

[84] *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

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.[85]

The federal Sixth Circuit Court of Appeals affirms that teachers have discretion in accepting and grading assignments accordingly when the religious material is not relevant to the assignment.[86]

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.*

[85] 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.]

[86] *Settle v. Dickson County School Bd.*, 53 F.3d 152 (6th Cir. 1995); *DeNooyer v. Livonia Public Schools*, 12 F.3d 211 (6th Cir. 1993). *See also, O'Neal v. Falcon*, 668 F. Supp. 2d 979, 984 (W.D. Tex. 2009).

Texas law adds:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Homework and classroom assignments must be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school district. Students may not be penalized or rewarded on account of the religious content of their work.[87]

Based on this standard, students are permitted to express religious beliefs in their schoolwork, and teachers may not reward or penalize students based solely on their choice to include religious themes or content. A teacher should grade schoolwork with religious content on the same basis as other schoolwork.[88]

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.[89] 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,

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[87] Tex. Educ. Code § 25.153.

[88] *Settle v. Dickson County Sch. Bd.*, 53 F3d 152 (concluding that a teacher did not violate a ninth grader's free speech rights by awarding a grade of zero on her research paper on the life of Jesus Christ because the student failed to follow instructions by seeking advance approval of the topic).

[89] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000); *Lee v. Weisman*, 505 U.S. 577, 587-588 (1992). *See also, Doe v. Beaumont Independent School*, 240 F.3d 462, 498 (5th Cir. 2001).

whether it be sectarian, secular, or both.[90] Federal courts are currently split on what is allowed as far as student-initiated prayer in graduation ceremonies.[91]

The Texas Religious Viewpoint Antidiscrimination Act (RVAA) states, "Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions."[92]

IX. Acknowledgment and celebration of religious holidays

In general, an absence for a religious holy day is considered an excused absence for purposes of truancy, but other considerations may apply. Because absences for religious holy

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[90] *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 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." *See also, Does 1-7 v. Round Rock Independent School Dist.*, 540 F. Supp. 2d 735, 749 (W.D. Tex. 2007).

[91] *See Adler v. Duval County School Bd.*, 250 F. 3d 1330 (11th Cir. 2001); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F. 3d 1471 (3rd Cir. 1996). *See also, Doe v. Santa Fe Independent School Dist.*,168 F. 3d 806, 819 (5th Cir. 1999).

[92] Tex. Educ. Code § 25.153.

days must be counted as days of attendance when school work is made up, perfect attendance awards may not be withheld on the basis of excused absences for observance of religious holidays.[93] On the other hand, absences for holy days excused under Section 25.087(b) do not count as days of attendance for the purpose of the 90 percent rule, found at Texas Education Code section 25.092. Regardless of whether the absences are excused, the student must actually be in attendance 90 percent of the days a class is offered in order to receive credit for the course, unless the district's attendance committee determines that extenuating circumstances existed.[94]

To the extent the Texas Education Code does not resolve a question about attendance, consider also the Free Exercise Clause and RFRA. In a case predating the current Texas Education Code, members of a church requiring abstinence from secular activity on seven annual holy days, causing students to miss between eight and ten school days per year, successfully challenged a school district policy that limited excused absences for religious holidays to two days per school year and required that students receive zeros for days with unexcused absences. The court held that the district's policy violated the students' free exercise right, because no compelling governmental interest justified the significant burden on the students' religious practice.[95]

An issue of national importance concerns whether the Establishment Clause 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

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[93] Tex. Att'y Gen. Op. No. JC-99 (1999).
[94] Tex. Att'y Gen. Op. No. JC-398 (1999).
[95] *Church of God (Worldwide, Tex. Region) v. Amarillo Indep. Sch. Dist.*, 511 F. Supp. 613 (N.D. Tec. 1981), *aff'd*, 670 F.2d 46 (5th Cir. 1982).

displays if the court uses the historical/traditional analysis.[96] This is because religious symbols alongside secular symbols send the secular message of inclusion and the freedom of one to choose his or her own beliefs.

X. Release time

Release time is related to the rights of religious persons in America's public schools. In *Zorach v. Clauson*,[97] public school may, but is not required to, permit release time for public school students to attend religious classes, so long as the religious classes are not on public school property and the public schools do not coerce students to attend religious instruction or punish those who do not attend. Texas has no statute authorizing release time; however, parents should investigate the possibilities of starting a "released time program" in the local school district.

XI. Accommodations for religious students in public postsecondary institutions

The Texas 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 consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No

[96] *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). *See also, Freedom from Religion Foundation, Inc. v. Mack*, 2021 WL 2887861 (5th Cir. 2021).

[97] 343 U.S. 306 (1952).

> human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.[98]

When analyzing whether a school rule may impose upon a student's religious practice, the Fifth Circuit Court of Appeals has also applied the Religious Freedom Restoration Act. The RFRA prevents a government agency in Texas from substantially burdening a person's free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[99]

[98] Tex. Const. art. I, § 6.
[99] Tex. Civ. Prac. & Rem. Code §§ 110.003, 110.009.

PART II: PARENTS' RIGHTS

I. Constitutional rights of parents under the U.S. and Texas 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."[100] 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.[101]

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."[102] 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.[103] 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."[104] Finally,

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[100] U.S. Const. amend. XIV.
[101] *Troxel v. Granville*, 530 U.S. 57 (2000). *See also, Littlefield v. Forney Ind. School Dist.*, 108 F. Supp. 2d 681, 699 (N.D. Tex. 2000).
[102] *Id.* at 65 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).
[103] *Id.* at 65 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925)).
[104] *Id.* at 65-66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

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."[105]

In Texas, the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state for even when blood relationships are strained, the parents retain a vital interest in preventing the irretrievable destruction of their family life.[106]

II. Access to student records and information

A. FERPA and Tex. Educ. Code § 26.004

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.[107] 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. Texas' student records law is Tex. Educ. Code § 26.004. Parents are entitled to: access their child's records, including attendance records, test scores, grades, disciplinary records, health records, student evaluations and reports of behavioral patterns; review teaching materials, including textbooks and aids; and review each test the child takes after it is administered to the child's class.

A 2002 Texas attorney general opinion addressed the question of whether a parent has unrestricted access to a child's

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[105] *Id.* at 66 (quoting *Parham v. J.R.* 442 U.S. 584, 602 (1979)).
[106] *In re S.K.A.*, 236 S.W.3d 875 (Tex. App. Texarkana 2007). As to the fundamental liberty interest protected under the Texas Constitution, *see* Tex. Jur. 3d, Constitutional Law § 191.
[107] 20 U.S.C. § 1232g; Tex. Educ. Code § 26.004.

school counseling records. The opinion stated a very narrow exception to the general rule that all student records are available to parents. Under FERPA, a public school may withhold a minor child's counseling records from a parent only if the records are kept in the sole possession of the counselor, are used only as the counselor's personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the counselor. In addition to the FERPA standards, state law provides that a licensed mental health practitioner may withhold a minor child's records only if the practitioner determines that the release of such records "would be harmful to the patient's physical, mental or emotional health." According to the Texas attorney general, a licensed mental health practitioner includes a licensed professional counselor but not a school counselor certified by SBEC.

FERPA give students and parents the right to:

1. Access students' education records, including the right to inspect and review those records.[108]
2. Waive their access to the students' education records in certain circumstances.[109]
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.[110]
4. Privacy with respect to such records and reports.[111]
5. Receive annual notice of their rights with respect to education records.[112]

All rights of a parent under Title 2 of this code [the part of the Texas Education Code that pertains to public schools] and all educational rights under §151.001(a)(10), Family Code, shall be exercised by a student who is 18 years of age or older or whose disabilities of minority have been removed for general purposes

[108] Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g(a)(1)(A)-(B).
[109] 20 U.S.C. § 1232g(a)(1)(D).
[110] 20 U.S.C. § 1232g(a)(2).
[111] 20 U.S.C. § 1232g(b)(1).
[112] 20 U.S.C. § 1232g(e).

under Chapter 31, Family Code, unless the student has been determined to be incompetent or the student's rights have been otherwise restricted by a court order. Rights Concerning Academic Programs(a) A parent is entitled to:(1) petition the board of trustees designating the school in the district that the parent's child will attend, as provided by § 25.033.

B. Other Texas laws

Other Texas laws give a parent of student the right to:

1. Temporarily remove their children from classes or school activities that conflict with their religious or moral beliefs by providing the teacher with a written statement to that effect. However, the removal may not be to avoid a test or for an entire semester, and the exemption from instruction does not exempt the child from grade level and graduation requirements. [113]
2. For districts with formal school uniform policies, state law provides that parents may exempt their children from a school uniform requirement if they can provide a bona fide religious or philosophical objection to wearing the uniform.[114]

C. 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) (20 U.S.C. § 1400 et seq.), 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

[113] Tex. Educ. Code § 26.010.
[114] Tex. Educ. Code § 11.162(c).

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

Regarding exemption from Instruction, Tex. Educ. Code § 26.010. states:

> (a) A parent is entitled to remove the parent's child temporarily from a class or other school activity that conflicts with the parent's religious or moral beliefs if the parent presents or delivers to the teacher of the parent's child a written statement authorizing the removal of the child from the class or other school activity. A parent is not entitled to remove the parent's child from a class or other school activity to avoid a test or to prevent the child from taking a subject for an entire semester.
> (b) This section does not exempt a child from satisfying grade level or graduation requirements in a manner acceptable to the school district and the agency.

Under the Protection of Pupil Rights Amendment ("PPRA") (20 U.S.C. §1232h) 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 information concerning the following things (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.[115]

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
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.[116]

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.[117]

[115] 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).
[116] 20 U.S.C. § 1232h(c)(2)(B)-(C).
[117] 20 U.S.C. § 1232h(c)(6)(B).

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 Pacific Justice Institute Legal Department for more information.

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