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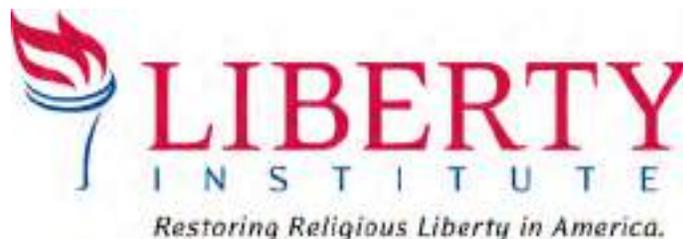


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Kelly Shackelford, *President/CEO*

Know and Stand Up for Your Religious Liberty Rights

Dear Public School Students,

Liberty Institute is committed to defending your religious liberty rights and ensuring that public schools abide by the First Amendment's guarantees of free speech, expression and the free exercise of religion.

If a public school censors or prohibits your religious speech, expression or practice, and you are unsure if the public school's actions violate your First Amendment freedoms, contact the Liberty Institute. We need people to stand up for religious freedom so that these freedoms will be preserved for our generation and the generations to come.

Your willingness to stand up for religious liberty may not only secure your own personal rights to engage in constitutionally protected speech, expression and practice, but may also impact thousands, if not millions, of other public school students nationwide. For such a time as this, we need courageous young men and women to stand with us at Liberty Institute in restoring and defending religious liberty in our public schools. Please join us!

Although the information included in Liberty Institute's "Know Your Religious Rights" kit is only intended to provide general guidance and should not be construed as legal advice, you can request specific legal help by contacting Liberty Institute at:

<https://www.libertyinstitute.org/take-action/request-legal>

Sincerely,

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A Student’s Constitutional Right to Pray, Read the Bible, and Discuss Religion during Non-Instructional Time

General Principles

It is well established that students have First Amendment rights in public schools.¹ Because public schools are dedicated places for learning, however, courts apply students’ rights differently than in other contexts.

There is an important distinction between government speech (the speech of the school district and its employees) and private student speech.² Although there are some limits that apply to government speech, the Constitution fully protects a student’s private religious expression.³

The First Amendment prohibits a school district and its employees from being hostile toward religious beliefs and expression. The proper role of a school district is to remain neutral and accommodating toward private religious beliefs.⁴ Unlike the government, students may promote specific religious beliefs or practices.⁵

As one U.S. Court of Appeals observed, the Constitution “does *not* permit [a public school] to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one’s religion would not be free at all.”⁶

Public schools must treat religious expression such as prayer, reading the Bible, and religious discussion the same way they treat similar non-religious expression.⁷

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc).

² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (“[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”) (internal quotations omitted).

³ *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”).

⁴ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”).

⁵ *See Pinette*, 515 U.S. at 760.

⁶ *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (emphasis added).

Frequently Asked Questions

Can students pray during lunch, recess, or other designated free time?

Yes, the First Amendment grants students the right to pray during non-instructional time, such as lunch, recess, or other designated free time, to the same extent that the school allows students to engage in non-religious activities. In other words, the school must treat religious expression, such as prayer, in the same way that it treats similar non-religious expression.

The U.S. Supreme Court stated that “nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day.”⁸

Additionally, the U.S. Department of Education guidelines provide:

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the education program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in non-religious activities.⁹

As long as the prayer is student-initiated and not substantially disruptive to the school environment,¹⁰ schools may not restrict or punish students from praying or expressing their faith, even in front of non-believers.¹¹ This means that if a school district allows students to converse with each other about any topic during lunch, recess, or free time, it has to allow students to pray, either individually or in a group, as long as the prayers are not disruptive.

Can students silently pray during a school’s moment of silence?

Yes, if the school has a moment of silence, students are allowed to silently pray, just as they may engage in any other silent activity. Teachers are prohibited from discouraging students from praying during this time.¹²

⁷ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

⁸ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313 (holding that although it is unconstitutional for the government to “affirmatively sponsor[] the particular religious practice of prayer” that the Constitution protects the right of students to engage in voluntary prayer). See also *Chandler*, 230 F.3d at 1317.

⁹ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).

¹⁰ *Tinker*, 393 U.S. at 511.

¹¹ *Chandler*, 230 F.3d at 1317.

¹² U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

Can students read the Bible or other religious materials at school?

Yes, during non-instructional time, students can read the Bible or other religious materials to the extent that the school allows students to read similar non-religious materials.¹³ The First Amendment prohibits schools from treating religious materials differently from non-religious materials, as long as the materials do not create a substantial disruption.

For example, if schools allow students to bring books from home to read during free time, then the school cannot prevent students from bringing a Bible and reading it during free time. In the same way, if a school allows students to bring car magazines to class to read, then students can also bring religious magazines.

Can students verbally share their faith with fellow students?

Yes, if a school allows students to freely converse with each other about various topics during non-instructional time, then students can also share their faith verbally with fellow students.¹⁴

In other words, if a school allows students to talk to each other in between classes, at recess, during lunch, or other non-class times, the school cannot specifically prohibit students from speaking to each other about religion and faith.

For example, if a school allows students to speak about sports, movies, or friendships during non-instructional time, the school cannot restrict students from also talking about their faith with others, as long as it is not substantially disruptive.

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<http://www.libertyinstitute.org/take-action/request-legal/>*

¹³ *Id.*

¹⁴ *Id.*; see also *Morgan*, 659 F.3d at 412 (“[W]hat one child says to another child is within the protection of the First Amendment”).



Christmas in the Public Schools

General Principles

It is well established that students have First Amendment rights in public schools.¹ Because public schools are dedicated places for learning, however, courts apply students' rights differently than in other contexts.

There is an important distinction between government speech (the speech of the school district and its employees) and private student speech.² Although there are some limits that apply to government speech, the First Amendment fully protects a student's private religious expression.³

Along those lines, the First Amendment prohibits the public school district and its employees from being hostile toward religious belief and expression. The proper role of the district is to remain neutral and accommodating toward private religious beliefs.⁴ Unlike the government, students may promote specific religious beliefs or practices.⁵

Finally, the government is allowed to acknowledge the role religion plays in American history and culture as long as the purpose is to further a secular program of education, and not to advance or inhibit religion.⁶

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc).

² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotations omitted).

³ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

⁴ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

⁵ See *Pinette*, 515 U.S. at 760.

⁶ See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (The "government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine.").

Frequently Asked Questions

Can a school refer to “Christmas” and have a “Christmas party,” or must the school have only “holidays” and “holiday parties?”

Christmas is perfectly fine, so long as the school is not celebrating Christmas for the purpose of furthering Christianity. A federal court held that a public school is allowed to celebrate Christmas (and other holidays with both religious and secular aspects) because doing so serves the educational goal of advancing students’ knowledge and appreciation of the role that America’s religious heritage has played in the social, cultural, and historical development of civilization.⁷ While public schools may celebrate Christmas, they do not have to; “holiday parties” are legally acceptable as well.⁸

Can a public school display Christmas decorations?

Yes, a school district may include the temporary use of decorations and symbols to demonstrate the cultural and religious heritage of the Christmas holiday.⁹ In this way, the decorations and symbols are a teaching aid and resource, and not part of a religious exercise.

In a different context, the Supreme Court allowed the display of a Nativity scene, which depicts the historical origins of the Christmas holiday, when the religious display was next to many secular symbols, including Santa Claus, a reindeer, lights, candy-striped poles, carolers, and a teddy bear.¹⁰

Can a school include religious Christmas music, art, or drama in a school play or performance?

Yes, so long as the religious music, art, or drama is presented in an objective manner as a traditional part of the cultural and religious heritage of Christmas. In fact, a federal court has held that to allow students only to study, and not to participate in religious art, literature, and music when such works have developed an independent secular and artistic significance would give students a truncated view of our culture.¹¹

Federal courts have also affirmed that choirs can sing both religious and secular songs, as long as the religious songs are not part of a religious exercise.¹² One court stated that if the music curriculum is designed to cover the full array of vocal music, the inclusion of religious songs is to be expected.¹³ Another court, recognizing that most choral music is

⁷ *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1314 (8th Cir. 1980).

⁸ *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 610 (3rd Cir. 2009).

⁹ *Florey*, 619 F.2d at 1314.

¹⁰ *Lynch*, 465 U.S. at 671-72.

¹¹ *Florey*, 619 F.2d at 1316.

¹² *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

¹³ *Bauchman*, 132 F.3d. at 554.

religious, stated that preventing public schools from including religious songs would demonstrate an unlawful animosity towards religion.¹⁴

Can students give out Christmas gifts with religious messages at school parties?

If students are allowed to distribute gifts at a school party, then the students may not be prohibited from giving out their gifts just because the gift includes a religious message.¹⁵

Please note, however, that a few courts have deviated from this generally accepted rule in cases involving student religious expression in class assignments when younger students, such as kindergarten and first grade students, are involved. Some federal appeals courts in the Third Circuit, which consists of Delaware, New Jersey, and Pennsylvania, and in the Sixth Circuit, which consists of Kentucky, Michigan, Ohio, and Tennessee, have granted more discretion to schools in these situations depending on the particular facts. If this situation arises, please contact Liberty Institute for further analysis and guidance.

Can students express their faith in classroom and homework assignments?

Yes. The First Amendment protects a student's private work and the school may not prevent students from expressing their faith in their assignments. According to the U.S. Department of Education:

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content."¹⁶

Another example is if a teacher instructs the students to write a story about the winter season, students may write about Christmas or Hanukkah as much as they may write about sledding or ice skating.

Can teachers and other school employees discuss religion?

During instructional time, teachers and other school employees are acting in their official capacities and must remain neutral towards religion. As stated above, school district employees can discuss the historical and cultural role of religion as part of a secular program of education.

¹⁴ *Duncanville Indep. Sch. Dist.*, 70 F.3d at 407-08.

¹⁵ *Morgan*, 659 F.3d at 410, 412.

¹⁶ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Feb. 7, 2003), available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

Teachers and other school employees can only promote religion when not acting in their official capacities. According to the U.S. Department of Education, teachers may “take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities.”¹⁷

Similarly, outside of the school day, school officials are allowed to participate in private religious events, such as Christmas parties, in their personal capacities.¹⁸ This is even true when the private religious event takes place on school grounds before or after school hours.¹⁹ For example, if a church group rents out a classroom after school hours for a Christmas party, the teacher may attend, just like any other private citizen.

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¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Wigg v. Sioux Falls Sch. Dist.* 49-5, 382 F.3d 807, 815 (8th Cir. 2004) (holding that a teacher may participate in a religious, after-school program on school grounds in her capacity as a private citizen).



Student Religious Expression in Class Assignments

General Principles

It is well established that students have First Amendment rights in public schools.¹ Because public schools are dedicated places for learning, however, courts apply students' rights differently than in other contexts.

There is an important distinction between government speech (the speech of the school district and its employees) and private student speech.² Although there are some limits that apply to government speech, the Constitution fully protects a student's private religious expression.³

The First Amendment prohibits a school district and its employees from being hostile toward religious beliefs and expression. The proper role of a school district is to remain neutral and accommodating toward private religious beliefs.⁴ Unlike the government, students may promote specific religious beliefs or practices.⁵

As one U.S. Court of Appeals observed, the Constitution "does *not* permit [a public school] to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all."⁶

Public schools must treat religious expression the same way they treat similar non-religious expression.⁷

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc).

² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotations omitted).

³ *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.")

⁴ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.")

⁵ *See Pinette*, 515 U.S. at 760.

⁶ *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (emphasis added).

Frequently Asked Question

Can students incorporate religion or their faith in school assignments or projects?

Yes, students can express their faith in school assignments such as homework, projects, or artwork.

The U.S. Department of Education's guidelines state:

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.⁸

To further illustrate, if a teacher instructed students to draw pictures about the "winter season," a student could draw a picture of the birth of Jesus as part of the Christmas tradition in the same way that a student could draw a picture of a snowman. The First Amendment forbids a teacher from giving a student who incorporates religion into her assignment a lower grade based on the religious viewpoint expressed.

Although schools cannot discriminate against religious expression,⁹ they can require that the religious expression is related to the topic assigned, that the assignment reflects the student's own work, and that the student has followed the specific directions of the assignment. For example, if the class assignment is to write about the Constitution and a student writes about the Bible instead, the student can be penalized for not following the directions of the assignment.

It is important to note that student expression in class assignments is different than school-sponsored publications (such as school newspapers), theatrical productions, or other school-sponsored activities that the school district promotes and that appear to be the speech of the school district itself.¹⁰

⁷ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

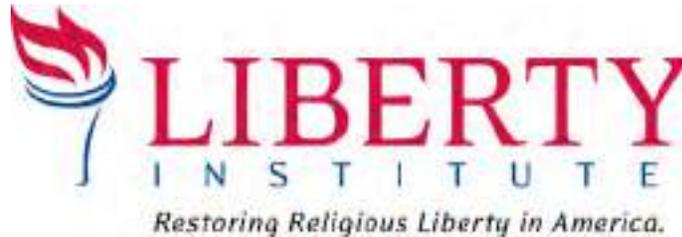
⁸ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

⁹ See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-29, 845-46 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Morgan*, 695 F.3d at 401-02.

¹⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-271 (1988).

Please note that a few courts have deviated from this generally accepted rule in cases involving student religious expression in class assignments when younger students, such as kindergarten and first grade students, are involved. Some federal appeals courts in the Third Circuit, which consists of Delaware, New Jersey, and Pennsylvania, and in the Sixth Circuit, which consists of Kentucky, Michigan, Ohio, and Tennessee, have granted more discretion to schools in these situations depending on the particular facts. If this situation arises, please contact Liberty Institute for further analysis and guidance.

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Student-Led Religious Clubs at Public Schools

General Principles

The Equal Access Act¹ provides federal protections for student-led religious clubs in secondary schools. If a public secondary school² receives federal funds and allows non-curricular clubs to meet on campus before or after classroom instruction,³ then federal law prohibits the school from discriminating against religious clubs.⁴

Non-curricular clubs are student organizations that “do[] *not* directly relate to the body of courses offered by the school.”⁵ For example, clubs like the chess club, a stamp collecting club, or a community service club are non-curricular clubs because they do not “directly relate” to the school’s curriculum.⁶ On the other hand, if the school offers a Spanish class, then the Spanish Club is a curricular club. Other examples of curricular clubs may include student government⁷ and school band.⁸

A school can legally limit its student clubs to curricular clubs (e.g. Spanish club, student government, school band). If the school allows at least one non-curricular club (e.g. stamp collecting club, chess club, community service club), however, then the school must allow religious clubs to meet.⁹

The religious club must be voluntary and student initiated,¹⁰ and the school and its employees may not sponsor the religious student club.¹¹

¹ 20 U.S.C. §§ 4071-4074.

² “The term ‘secondary school’ means a public school which provides secondary education as determined by State law.” 42 U.S.C. § 4072(1).

³ 20 U.S.C. §§ 4072(4).

⁴ *Id.* § 4071(a); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993).

⁵ *Mergens*, 496 U.S. at 239-40 (emphasis added) (A “‘noncurriculum related student group’ is . . . any student group that does not directly relate to the body of courses offered by the school. . . . [A] student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.”).

⁶ *Mergens*, 496 U.S. at 240.

⁷ “A school’s student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school.” *Mergens*, 496 U.S. at 240.

⁸ “If participation in a school’s band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum.” *Mergens*, 496 U.S. at 240.

⁹ 20 U.S.C. § 4071.

¹⁰ *Id.* § 4071(c)(1).

¹¹ *See id.* § 4071(c)(2).

Individuals outside of the school may not “direct, conduct, control, or regularly attend activities of [religious] student groups.”¹²

Frequently Asked Questions

When may religious student groups meet on campus?

Public secondary schools that receive federal funds must allow religious student groups to meet during non-instructional times if the school allows other non-curriculum student groups to meet.¹³

For example, a religious club may meet in a classroom during lunch if the school allows non-curriculum student groups, such as the scuba diving club, to meet in classrooms during that time.¹⁴

May religious clubs use school resources (e.g. school facilities, bulletin boards, public address system) to promote or facilitate club events?

Yes, religious clubs may use school resources that are available to non-curriculum clubs.¹⁵

For example, if a school makes available resources such as classrooms, bulletin boards, the public address system, or school vehicles to non-curricular clubs, then the school cannot deny those resources to religious groups.¹⁶ Public schools must treat religious and secular non-curricular clubs the same.

May teachers or other school employees attend a religious student group’s meetings?

Yes, teachers or other school employees may attend a student-led religious meeting in a non-participatory role (i.e., supervisory role).¹⁷ For example, teachers may attend a student-led Bible Club meeting to supervise, although they may not participate in the Bible study.

May members of religious student clubs distribute flyers about meetings and events during school hours?

Yes, students may distribute religious material if the school allows students to distribute other materials. Public schools cannot prevent a student group from distributing material only because the material contains religious messages.¹⁸ The school may restrict the distribution if it will reasonably cause a substantial disruption of or material interference with school activities.¹⁹

¹² See *id.* § 4071(c)(5).

¹³ 20 U.S.C. § 4071; see also *Ceniceros v. Bd. of Tr. of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997);

¹⁴ See *Ceniceros*, 106 F.3d at 880, 882.

¹⁵ *Mergens*, 496 U.S. 226, 247 (1990); *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002); see *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1246, 1256 (3d Cir. 1993).

¹⁶ See *Prince*, 303 F.3d at 1094.

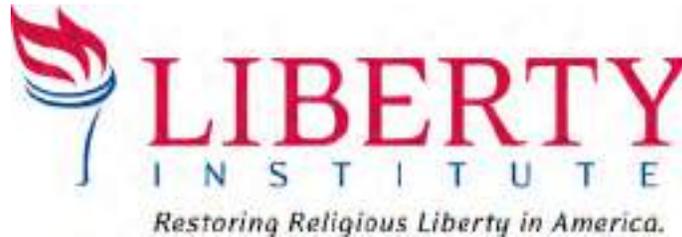
¹⁷ 20 U.S.C. § 4071(c)(3).

¹⁸ *Rivera v. East Otero Sch. Dist. R-1*, 721 F.Supp. 1189 (D. Colo. 1989).

¹⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Public schools may enact reasonable time, place, and manner restrictions as long as they treat religious flyers the same way they treat non-religious flyers.

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Student Religious Speech at Graduation Ceremonies

General Principles

It is well established that students have First Amendment rights in public schools.¹ Because public schools are dedicated places for learning, however, courts apply students' rights differently than in other contexts.

There is an important distinction between government speech (the speech of the school district and its employees) and private student speech.² Although there are some limits that apply to government speech, the First Amendment fully protects a student's private religious expression.³

Frequently Asked Question

May students pray at graduation ceremonies or include religious content in their speeches?

Yes, students can include religious content, including prayer, in their graduation speeches so long as the students were selected by neutral criteria (e.g. valedictorian and salutatorian are selected by grade point average, class officers are selected by a student body vote) and the control over the content of each address is left to the students, and not the school.

According to the U.S. Department of Education's guidelines:

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc).

² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotations omitted).

³ *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.⁴

For example, if the school district allows the valedictorian, salutatorian, class president, and class vice-president to each speak for a certain amount of time, and the students have control over the content of their speeches, then the school cannot discriminate against students who wish to incorporate religious speech, including prayer, in their addresses.

Please note, however, that a few courts have deviated from this generally accepted rule regarding the permissibility of religious content in graduation speeches. In one case, the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) determined that when school officials exercise *complete* control over a graduation ceremony, including student speech, that the school officials may remove proselytizing and sectarian language from a student's graduation speech. The court determined that an objective observer would perceive the speech to be approved and endorsed by the school, and therefore the school could remove the proselytizing comments to avoid an Establishment Clause violation.⁵

The Ninth Circuit, however, in a different case did not require school officials to eliminate all references to God in a student's graduation speech.⁶ After removing the proselytizing comments, the student was allowed to make "references to God as they related to [the student's] own beliefs."⁷ The student also distributed unedited copies of his graduation speech just outside of the graduation site, and at graduation, the student announced the time and place where he would deliver the unedited version of his speech.⁸

The Eleventh Circuit (Alabama, Georgia, and Florida) upheld a school district's policy that permitted "graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies."⁹ The policy did not refer to any religious speech. If the students voted to have a classmate deliver a speech, the classmate's speech would not be reviewed or edited by school officials; therefore, the speech was private student speech, and the message was allowed regardless of the religious content.¹⁰

If a situation arises concerning a public school district's attempt to censor a student's graduation speech, please contact Liberty Institute immediately for further analysis and guidance.

⁴ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).

⁵ *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1103–05 (9th Cir. 2000).

⁶ *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981–82 (9th Cir. 2003).

⁷ *Id.* at 981.

⁸ *Id.* at 981–82, 985.

⁹ *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1334, 1342 (11th Cir. 2001).

¹⁰ *Id.* at 1332, 1342.

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Student Religious Speech at Athletic Competitions, Student Assemblies, and Other Extracurricular Events

General Principles

It is well established that students have First Amendment rights in public schools.¹ Because public schools are dedicated places for learning, however, courts apply students' rights differently than in other contexts.

There is an important distinction between government speech (the speech of the school district and its employees) and private student speech.² Although there are some limits that apply to government speech, the First Amendment fully protects a student's private religious expression.³ In other words, "private speech is constitutionally protected, even though it occurs at a school related function."⁴

The First Amendment prohibits a school district and its employees from being hostile toward religious beliefs and expression. The proper role of a school district is to remain neutral and accommodating toward private religious beliefs.⁵

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc).

² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotations omitted).

³ *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

⁴ *See Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605, 613 (8th Cir. 2003).

⁵ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

Frequently Asked Questions

Can students privately pray, either individually or as a group, at a school athletic competition (such as a football game), student assembly, or other extra curricular activity when school officials (teachers or administrators) are not involved?

Yes, if the students are voluntarily praying without any involvement by a school official (teacher, administrator, etc.), then the First Amendment protects the students' prayer to the extent that the school allows other speech to occur. Indeed, the U.S. Supreme Court stated that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day."⁶

For example, if members of a football team are allowed to talk to one another about any subject prior to a game, then the school is prohibited from discriminating against students who wish to engage in religious speech or pray together during this time.⁷ The school cannot treat conversations about religion differently than conversations about movies, friendships, or any other similar non-religious speech.

Can a school district allow student-led prayer before an athletic competition (such as a football game), a student assembly, or other extracurricular event as part of the school program?

Yes, students can pray or speak about religion when a school has policies in place that allow students to speak, the policies are neutral towards religion (by neither encouraging nor discouraging religious speech or prayer), the school does not control the content of the student speech, and it is clear that the speech is the student's and not the school's.

According to the U.S. Department of Education's guidelines:

Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious

⁶ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313 (holding that although it is unconstitutional for the government to "affirmatively sponsor[] the particular religious practice of prayer" that the Constitution protects the right of *students* to engage in voluntary prayer). See also *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000).

⁷ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; see also *Morgan*, 659 F.3d at 412 ("[W]hat one child says to another child is within the protection of the First Amendment").

(or anti-religious) content. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.⁸

For example, if a school allows a student speaker to deliver “opening remarks” before each athletic competition, and the student speaker is chosen by neutral criteria (such as a position in student council, a position on the athletic team, or is selected randomly), and the school does not control the speech of the student, then the student speaker can discuss about religion, pray, or engage in any other speech during this time because his or her speech is constitutionally-protected, private speech. Additionally, under these policies, the First Amendment prohibits the school from disallowing a student from engaging in religious expression since the speech is private religious speech.

It is important to note that “the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. Without more, however, such review does not make student speech attributable to the state.”⁹ This means that a school official can review a student’s speech for vulgarity, lewdness, or sexually explicit language and the speech can still remain private, constitutionally-protected expression.

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⁸ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (emphasis added).

⁹ *Id.*

ABOUT LIBERTY INSTITUTE

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Liberty offers *pro bono* (free) legal assistance to defend Americans' religious freedom. Liberty Institute's distinctive approach features:

- **A 99 Percent Win Rate** – The highest win rate of any religious defense organization.
- **“Home-Field Advantage”** – Our national network of America's best attorneys “know the territory” and how to win wherever the case is.
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