No. 99-2036

IN THE

SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ET AL.,
Petitioners,

v.

MILFORD CENTRAL SCHOOL

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

BILL PRYOR
Attorney General of Alabama
MARGARET L. FLEMING
JOHN J. PARK, JR.
CHARLES B. CAMPBELL*
Assistant Attorneys General
*Counsel of Record**

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

Counsel for *Amicus Curiae*, The State of Alabama

(Additional Counsel listed on Inside Front Cover)

Additional Counsel for *Amici Curiae*

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

CHARLES M. CONDON
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

RICHARD P. IEYOUB
Attorney General of Louisiana
State Capitol, 22nd Floor
Baton Rouge, Louisiana 70804-9005
(225) 342-7013

PAUL G. SUMMERS
Attorney General of Tennessee
425 Fifth Avenue North
Nashville, Tennessee 37243-0485
(615) 741-3491

MIKE MOORE
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3796

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2100

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

JAN GRAHAM
Attorney General of Utah
P.O. Box 140854
Salt Lake City, Utah 84114-0854
(801) 366-0180

BETTY D. MONTGOMERY
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-4940

MARK L. EARLEY
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071

QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution.

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS — *Continued*

Page

TABLE OF AUTHORITIES

Page(s)

Supreme Court Cases:

TABLE OF AUTHORITIES — *Continued*

Page(s)

Court of Appeals Cases:

District Court Cases:

TABLE OF AUTHORITIES — *Continued*

Page(s)

Statutes and Rules:

Other authorities:

BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

The States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Tennessee, Texas, Utah, and Virginia respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of Petitioners The Good News Club, Andrea Fournier, and Darleen Fournier.

INTEREST OF *AMICI CURIAE*

The *amici* States have a profound interest in protecting the free-speech rights and religious liberties of their citizens, and in ensuring that their public school officials have clear and reliable guidance when they face questions concerning the use of public property by religious organizations. The decision of the Second Circuit in this case, *Good News Club* v. *Milford Central School*, 202 F.3d 502 (2d Cir. 2000), *aff'g* 21 F. Supp. 2d 127 (N.D.N.Y. 1998), subjects religious speech to unconstitutional viewpoint-based discrimination and muddies the water in an important area of First Amendment law that this Court has previously made clear.

State and local school officials in the *amici* States have long relied on this Court's guidance in cases such as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), in adopting neutral policies governing the use of public school

facilities. *See, e.g.*, Office of the Attorney General, State of Alabama, *Guidelines for Religious Activities in Schools* (July 21, 2000) (reproduced in Appendix A);[1] Board of Educ., Commonwealth of Virginia, *Guidelines Concerning Religious Activities in the Public Schools* (June 22, 1995) and Office of the Attorney General, Commonwealth of Virginia, *Memorandum of Legal Principles Animating Guidelines* (Jan. 9, 1995) (reproduced in Appendix B); *see also* U.S. Dep't of Educ., *Religious Expression in Public Schools* (Rev. ed. May 1998) (reproduced in Appendix C). In following the course of neutrality, state and local officials have been assured by this Court's decisions that they could safely navigate between the Scylla of violating the Free Speech Clause and the Charybdis of violating the Establishment Clause when facing requests for use of public school facilities by religious clubs and organizations. The decision below in this case casts doubt on the Court's interpretation of neutrality, however.

This doubt leaves public officials in the *amici* States in the unenviable position of attempting to discern whether the previously certain course set by the principle of neutrality remains good law in all cases, or if it must be modified. This uncertainty leaves public officials open to lawsuits no matter what they decide when a religious club or organization requests to use school facilities. Finally, this case is of particular importance because Good News Clubs operate in all of the *amici* States. The *amici* States thus have an abiding interest in the resolution of this case.

---

[1] The Attorney General of Alabama issued updated guidelines after the Court's decision in *Santa Fe Independent School District* v. *Doe*, 120 S. Ct. 2266 (2000).

SUMMARY OF ARGUMENT

At the heart of this case lies the neutrality commanded of the States by the Free Speech and Religion Clauses of the First Amendment. It is axiomatic that a State may not discriminate against speech based upon the viewpoint it espouses — even in a limited public forum. Over the past two decades, the Court has repeatedly held that this rule of neutrality applies with equal force to religious speakers, and the Establishment Clause does not justify governmental discrimination against them.

Respondent in this case permits non-school-sponsored clubs such as the Boy Scouts, Girl Scouts, and 4-H Club to use its facilities after school hours "to promote the moral and character development of children." Brief for Defendant-Appellee Milford Central School at 9, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). Petitioners, however, view morality and character development as "senseless without Christ." J.A. at P25 (Dep. of Steven Fournier), *quoted in* 202 F.3d at 509. Thus, the Good News Club and its speakers attempt to "promote the moral and character development of children" through Bible lessons, songs, prayer, and proselytizing.

Respondent refused to allow the Good News Club to use its facilities precisely because of the Club's religious views on morality and character development and the Club's views on the best means of promoting those civic virtues. This would appear to be a classic form of viewpoint discrimination, but the Court of Appeals ruled that the Club's religious activities — Bible stories, songs, prayer, etc. — changed the subject of the Petitioners' speech from "morality and character development" to "religious instruction" or "worship." This Court has at

least twice rejected such a distinction between "religious" speech and speech "about" religion.

A rule such as that adopted by the Court of Appeals is unworkable. In an age of religious pluralism, it could well prove impossible to determine what words or acts might constitute worship in a given religious tradition. The very attempt to decide that question, moreover, would unconstitutionally entangle the State with religion.

Censorship was not necessary to obey the Establishment Clause in this case. Petitioners' meetings were held after school, were not sponsored by the school, and were open to any child as part of a program in which many clubs met on school property. Given these facts, there was little potential that members of the community would perceive an endorsement of religion by Respondent. If Respondent remained concerned about the possibility of any confusion, it could have explained its neutrality to the school's parents and required the continued use of parental permission slips. If Milford was concerned about children being confused about the school's neutrality, it could take that as an opportunity for a first civics lesson, explaining its position in age-appropriate terms. Even young children understand the neutral role of umpires and referees in sports and playground games, and Respondent could have described its role in similar terms. The solution to Respondent's concern about an appearance of endorsement in this case was "more speech" with reasonable, viewpoint-neutral measures — not censorship.

Finally, public officials need clear guidance and workable rules to uphold the principle of governmental neutrality toward religion. Officials in the State and Federal governments have been attempting to provide clear, concise guidelines to assist public school officials in

discharging their constitutional duties. A key part of this guidance has been the explaining the fundamental principle of governmental neutrality toward religion. Neutrality is a principle that governmental officials can understand and apply. It is a principle governmental lawyers can explain.

A rule such as that adopted by the Court of Appeals frustrates efforts to underscore the importance of neutrality, sowing unnecessary confusion by requiring government to treat religious organizations less favorably than others. The decision of the Court of Appeals represents a substantial and troubling departure from the principle of governmental neutrality embodied in this Court's precedents concerning the rights of religious speakers in limited public fora created by public schools and universities. As such, the decision of the Court of Appeals must be reversed.

ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THIS COURT'S PRECEDENT AND SANCTIONS GOVERNMENTAL SUPPRESSION OF SPEECH FROM A RELIGIOUS VIEWPOINT.

This case is strikingly similar to *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993). Both cases involve the same state statute, N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 2000). The school board policy creating the limited public forum in this case bears a remarkable resemblance to the policy at issue in *Lamb's Chapel*. *Compare* 508 U.S. at 387

(describing Center Moriches policy) *with* Pet. App. D1–D3 (Milford policy).[2] Without even mentioning *Lamb's Chapel*, however, the panel majority of the Court of Appeals held that Respondent's exclusion of the Good News Club from Milford's limited public forum for non-school-sponsored, after-school clubs was a permissible form of content discrimination, rather than unconstitutional viewpoint discrimination. *See* 202 F.3d at 509–11. One judge dissented, observing that he could not "square the majority analysis in this case with *Lamb's Chapel*." *Id.* at 513 (Jacobs, J., dissenting).

With its ruling, the Second Circuit — speaking through the author of the decision reversed in *Lamb's Chapel*[3] — attempted to revive reasoning rejected by this Court in that case and in *Widmar* and *Rosenberger*. In so doing, "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment was compromised . . . ." *Rosenberger*, 515 U.S. at 845.

A. This Court Has Consistently Required Viewpoint Neutrality Toward Religious Speakers in Limited Public Fora Created by Public Schools and Universities.

In *Widmar* v. *Vincent*, this Court addressed the use of public university facilities by student religious organiza-

---

[2]The parties agreed and the courts below held that Respondent had created a limited public forum through its community use policy. 202 F.3d at 509; 21 F. Supp. 2d at 153. This Court's decision last term in *Santa Fe Independent School District* v. *Doe* is thus inapposite here because the Court held that no public forum had been created in that case. 120 S. Ct. at 2275 & nn.12–13.

[3]*See* 202 F.3d at 504 (showing Judge Miner as author of opinion); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 383 (2d Cir. 1992) (same), *rev'd*, 508 U.S. 384 (1993).

tions. In *Widmar*, a State university refused to allow a religious student organization to use university facilities for "religious worship and discussion" even though the facilities were otherwise open to all registered student organizations. 454 U.S. at 269. The Court held that "religious worship and discussion" in a limited public forum "are forms of speech and association protected by the First Amendment," thus rejecting the dissent's suggestion "that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." *Id.* at 269 & n.6 (discussing *id.* at 283–86 (White, J., dissenting)).

Accordingly, the university's exclusion of private religious speech from its limited public forum could be justified only if it was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Id.* at 270. The university argued that allowing religious organizations to use its facilities would violate the Establishment Clause. *Id.* at 270–71. The Court rejected that argument, however, holding that an "equal access" policy does not violate the Establishment Clause. *Id.* at 271–75; *see also Board of Educ. of Westside Community Schs. (Dist. 66)* v. *Mergens*, 496 U.S. 226, 235 (1990) (*Widmar* "held that an 'equal access' policy would not violate the Establishment Clause").

In *Lamb's Chapel* v. *Center Moriches Union Free School District*, the Court held that a school district engaged in unconstitutional viewpoint discrimination against a local church that had applied to show a film series on school property after hours. 508 U.S. at 390–97. The school district allowed community groups to use its facilities for "social, civic, or recreational uses." *Id.* at 387. It forbade, however, use of school facilities " 'by any

group for religious purposes.' " *Id.* (quoting policy). When a local church applied to use school property to show a film series addressing family, child-rearing, and cultural issues from a Christian perspective, the school district refused. *Id.* at 387–89.

The Court held that the exhibition of the religious film series in *Lamb's Chapel* "was denied solely because the series dealt with the subject from a religious standpoint." *Id.* at 394. The Court held that "denial on that basis was plainly invalid under our holding in *Cornelius* [v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)] . . . ." 508 U.S. at 394. The Court reiterated that " 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' " *Id.* (quoting *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The Court thus held "that discriminating against religious speech was discriminating on the basis of viewpoint." *Rosenberger*, 515 U.S. at 832 (discussing *Lamb's Chapel*). Relying on *Widmar*, the Court in *Lamb's Chapel* also dismissed the school board's argument that permitting its property to be used for the film series would violate the Establishment Clause. 508 U.S. at 394–95.

In *Rosenberger* v. *Rectors & Visitors of the University of Virginia*, the Court again held that a public university could not discriminate against a religious organization based upon the views it wished to express in a limited public forum created by the university. The "forum" in *Rosenberger* was a student activities fund that paid the printing costs of " 'student news, information, opinion, entertainment, or academic communications media groups.' " *Id.* at 824 (quoting fund's Guidelines). The university refused, however, to pay the printing costs of a

student publication called "Wide Awake: A Christian Perspective at the University of Virginia." *Id.* at 826–27. The university denied the request because it considered Wide Awake a "religious activity," *id.* at 827, which was excluded by the fund's Guidelines, *id.* at 825.

The Court concluded that the university's denial of third-party payments to the Christian publication was "based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid." *Id.* at 832. The Court noted that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. The Court rejected the assertion that the university's discrimination was not viewpoint-based simply because it attempted to exclude all religious views. *Id.* at 831–32.

Finally, the Court rejected the assertion that the Establishment Clause required the university to exclude the Christian publication from its forum. *Id.* at 837–45. The Court noted that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion," *id.* at 839, and held that the university's student activities fund was in fact "neutral toward religion," *id.* at 840. The Court emphasized that "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.* at 839 (citing *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274–75).

B. The Decision of the Court of Appeals Conflicts with *Widmar*, *Lamb's Chapel*, and *Rosenberger* and Censors Religious Speech.

The decision of the Second Circuit in this case conflicts with *Widmar*, *Lamb's Chapel*, and *Rosenberger*. It authorizes governmental officials to censor private speech to filter out views that are "too" religious. In the name of prohibiting "religious instruction" and "worship," the Court of Appeals empowered governmental officials to root out those views that do not "meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844.

Much like the Center Moriches policy in *Lamb's Chapel*, Respondent's policy allows district residents to use school facilities after hours for

> holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public.

Pet. App. at D1 (Milford "Community Use of School Facilities" Policy ¶ 3).[4]

---

[4] The Center Moriches policy in *Lamb's Chapel* similarly permitted district residents to use school facilities after hours for

> social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with §414 (Rule 8). Rule 7, however, consistent with the judicial interpretation of state law, provides that "[t]he school premises shall not be used by any group for religious purposes."

Lamb's Chapel, 508 U.S. at 387 (citing and quoting Pet. App. at 57a).

Milford admits that it allows the Boy Scouts, Girl Scouts, and 4-H Club to use school property "to promote the moral and character development of children." Brief for Defendant-Appellee Milford Central School at 9, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). Respondent's admission on this point is certainly correct — as far as it goes. The 4-H Club states that one of the goals of its programs is "addressing youth and societal issues." Lodging at AA5. The 4-H Club's purpose "is to enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." *Id.*

Respondent fails, however, to acknowledge adequately the religious aspects of the clubs it allows to use its facilities. For example, part of the Girl Scouts' promise is "[t]o serve God." Lodging at Z2. At the Boy Scouts meetings, each member similarly pledges "[t]o do my duty *to God*." Lodging at Y9 (emphasis added). The Boy Scout Law states: "A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others." *Id.* The Boy Scouts "endeavor[] to develop American citizens who . . . have personal values *based on religious concepts* . . . ." *Id.* at Y7 (emphasis added). The Cub Scouts (a part of Boy Scouts) state that one of their purposes is to "[i]nfluence a boy's character development *and spiritual growth*." *Id.* at Y3 (emphasis added).

Petitioners have asserted that "because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ . . . ." J.A. at P25 (Dep. of Steven Fournier). Thus, the Good News Club encourages the "moral and character development of children" through Bible lessons, games, songs, prayer, and proselytizing. In the opinion of the Court of Appeals,

this avowedly religious perspective distinguished the Good News Club from the Girl Scouts and Boy Scouts, although the Scouts also promote religious devotion. The Court of Appeals thought that the Good News Club's approach to morality, with its emphasis on Christian faith and devotion, was simply "too" religious to be allowed in Milford's facilities.

Under *Lamb's Chapel*, the "critical question" in this case should have been "whether it discriminates on the basis of viewpoint to permit school property to be used [by non-school-sponsored student clubs] for the presentation of all views about [the moral and character development of children] except those dealing with the subject matter from a religious standpoint." 508 U.S. at 393 (modified as indicated to reflect the facts of this case). Because Milford was already allowing the Scouts to address these topics "from a religious standpoint," however, the question really should have been whether it discriminates on the basis of viewpoint to exclude certain groups that address the subject matter of morality and character development from a standpoint that is "more" religious than that of other groups that are allowed to present their religiously-based views.

Instead of following *Lamb's Chapel* the Second Circuit followed its earlier decision in *Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), which stated that "it 'is not difficult for school authorities to make' the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.' " 202 F.3d at 510 (quoting *Bronx Household*, 127 F.3d at 215). The Court of Appeals concluded that the Good News Club's activities were "something other than simply

teaching moral values," that they did "not involve merely a religious perspective on the secular subject of morality," and that the Club went "far beyond merely stating its viewpoint." *Id.* at 510. According to the Court of Appeals, the Club's activities were not materially different from "religious worship." *Id.* (quoting *Full Gospel Tabernacle* v. *Community Sch. Dist. 27*, 979 F. Supp. 214, 217 (N.D.N.Y. 1997), *aff'd per curiam*, 164 F.3d 829 (2d Cir. 1999), *cert. denied*, 527 U.S. 1036 (1999)). The Court of Appeals thus held "that the Club's activities fall outside the bounds of pure 'moral and character development.' " *Id.* at 511.

This classification of the Good News Club's activities as unprotected "religious instruction" or "worship" was precisely the approach rejected by this Court in *Widmar*, 454 U.S. at 269–70 n.6, 272 n.11, and *Rosenberger*, 515 U.S. at 844–45. In *Widmar*, the dissent "argue[d] that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." *Id.* at 269 n.6 (citing *id.* at 284 (White, J., dissenting)). The Court rejected this attempt to "distinguish between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' constituting 'worship.' " *Id.* at 269 n.6 (quoting *id.* at 285 (White, J., dissenting).

The Court cited "at least three difficulties" with attempting to distinguish between religious "speech" and religious "worship" for purposes of First Amendment protection:

> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be

> "singing, teaching, and reading" — all apparently forms of "speech," despite their religious subject matter — and become unprotected "worship."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university — and ultimately the courts — to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.
>
> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. . . . [I]t gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted. . . .

Id. at 269–70 n.6 (citations omitted) (quoting *id.* at 283 (White, J., dissenting)). In underscoring the risk of excessive entanglement of government with religion, the Court went on to observe that just "to determine which words and activities fall within 'religious worship and religious teaching' . . . could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.' " *Id.* at 272 n.11 (quoting *O'Hair* v. *Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (footnote omitted), and citing Lawrence Tribe, *American Constitutional Law* § 14–6 (1978)).

The Court reiterated these concerns in *Rosenberger*, quoting from *Widmar* at length. 515 U.S. at 845 (quoting 454 U.S. at 269–70 n.6). There, however, the argument was slightly different from that made by the dissent in *Widmar*. The dissent in *Widmar* argued that "religious worship" was not generally protected by the Free Speech Clause. 454 U.S. at 269 n.6. In *Rosenberger*, however, the university argued that the exclusion of the student publication due to its religious nature was legitimately based on the paper's content, not its viewpoint. 515 U.S. at 830. The Court rejected this argument. *Id.* at 831–32.

The Court later discussed the perils inherent in requiring government to discriminate between "religious" speech and speech "about" religion:

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question — speech otherwise protected by the Constitution — contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve." That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's

> dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 844–45 (quoting *id.* at 896–97 (Souter, J., dissenting)). The Court held that such censorship of student speech and thought "was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845–46.

The Second Circuit essentially followed the *dissents* in *Widmar* and *Rosenberger*, not the opinions of the Court, *cf. Widmar*, 454 U.S. at 283–86 (White, J., dissenting); *Rosenberger*, 515 U.S. at 896–99 (Souter, J., dissenting). The result was precisely the "specter" the Court feared in *Rosenberger*: Governmental officials scanned the Good News Club's materials, found that they did not meet the government's "baseline standard of secular orthodoxy," 515 U.S. at 844, and censored the Club's views on morality and character development.

II. REQUIRING PUBLIC OFFICIALS TO DISCRIMINATE BETWEEN PROTECTED RELIGIOUS "SPEECH" AND ALLEGEDLY UNPROTECTED "WORSHIP" OR "RELIGIOUS INSTRUCTION" IS UNWORKABLE AND UNCONSTITUTIONAL.

The Court of Appeals based its decision in this case on the premise that "it 'is not difficult for school authorities to make' the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer." 202 F.3d at 510 (quoting *Bronx Household*, 127 F.3d at 215). This conclusion, too, is inconsistent with the decisions in both *Widmar* and *Rosenberger*.

As the Court indicated in *Widmar* and *Rosenberger*, the distinction between "religious" speech and speech "about" religion lacks "intelligible content." *See Rosenberger*, 515 U.S. at 845 (quoting *Widmar*, 454 U.S. at 269 n.6). "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading' . . . and become unprotected 'worship.' " *Widmar*, 454 U.S. at 269 n.6 (citation omitted), *quoted in Rosenberger*, 515 U.S. at 845.

Because there is no principled basis for determining when "singing, teaching, and reading" become allegedly unprotected "worship" rather than protected "speech," the task of public officials across the Nation in implementing a rule such as that adopted by the Second Circuit would be exceedingly subjective and arbitrary. Rather than simply determining whether a religious organization's request to use public facilities was consistent with the purposes for which those facilities could be used, public officials would have to determine if the religious organization's activities would be "too" religious. One can imagine the kinds of questions public officials would find themselves asking: Will the members of this group sing religious songs? Will they pray? Will they read the Bible, Qur'an, Book of Mormon, or other scripture? Will they proselytize? If they sing and pray, but do not read scripture or proselytize, must they be excluded? What if they only sing? What if they only pray? Does the answer change based on the significance of each activity in the group's religious traditions? Finally, if public officials got the answer "wrong," they would be subject to suit and a court would then have to ask the same questions.

This Court acknowledged in *Widmar* that it could prove "impossible" "to determine which words and activities fall within 'religious worship and religious

teaching,' " in an age of religious pluralism. 454 U.S. at 272 n.11. More importantly, the Court held that "[s]uch inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270 n.6, *quoted in Rosenberger*, 515 U.S. at 845.

The *amici* States submit that, as this Court stated in *Widmar*, the kinds of inquiry necessitated by the decision of the Second Circuit will impermissibly entangle the State with religion. These inquiries would further lead to official hostility toward private religious expression. This hostility is inconsistent with the First Amendment.

III. CENSORSHIP OF PETITIONERS' RELIGIOUS VIEWS WAS NOT NECESSARY TO OBEY THE ESTABLISHMENT CLAUSE AND DISPLAYED GOVERNMENTAL HOSTILITY TOWARD RELIGION.

Respondent has maintained throughout this case that its discriminatory treatment of the Good News Club was necessary to obey the Establishment Clause. *See* Brief for Defendant-Appellee Milford Central School at 23–25, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). This position fails to distinguish adequately between government speech and private speech about religion. Respondent's concerns about an appearance of governmental endorsement of the Good News Club's views could have been addressed through reasonable, viewpoint-neutral means that would not require censorship. By censoring Petitioners' views in a forum open to more secular clubs addressing the same subject matter, Respondent communicated governmental hostility, rather than neutrality toward religion. Such a message of hostility toward religion violates the First Amendment.

A. Censorship of Petitioners' Viewpoint Was Not Necessary to Obey the Establishment Clause.

In *Rosenberger*, the Court noted that "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." 515 U.S. at 839 (citing *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274–75). As in *Rosenberger*, Respondent and the courts below failed adequately to distinguish " 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.' " 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250 (plurality opinion) (emphasis in *Mergens*)). By refusing to allow the Good News Club to address the "moral and character development of children" from its admittedly religious perspective, school officials censored the Club's private speech and silenced its viewpoint on moral development. Such censorship was not necessary to obey the Establishment Clause.

Respondent's concerns about an appearance of governmental endorsement of religion, while an important consideration, are overstated. As in *Lamb's Chapel*, the Good News Club's meetings "would not have been during school hours, would not have been sponsored by the school, and would have been open to" any child, not just Christian children or Club members. 505 U.S. at 395. As in *Lamb's Chapel*, Milford's "property had repeatedly been used by a wide variety of private organizations." *Id.* Given these facts, "there would have

been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and any benefit to religion or to the church would have been no more than incidental." *Id.*

Any concern that children might misunderstand Milford's neutrality could be addressed using reasonable, viewpoint-neutral means. For example, Milford already required students to have parental permission to attend the Good News Club's meetings. *See* Lodging at X2. Such parental consent places "elementary children . . . on an equal footing with secondary school students" by incorporating parental maturity and decision-making in the process and by creating an opt-in program that reduces any appearance of endorsement to nonparticipants. *Herdahl* v. *Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 590 (N.D. Miss. 1996); *see also Good News/Sports Club* v. *School Dist. of City of Ladue*, 28 F.3d 1501, 1509 n.17 (8th Cir. 1994) (noting use of parental permission slips), *cert. denied*, 515 U.S. 1173 (1995). In addition, Milford could have prohibited teachers attending Club meetings, so that there would be no association between the Club and authority figures employed by the school.

If Respondent was worried that parents or other adults might misunderstand the school's constitutionally mandated neutrality toward religion, it could explain its position to them. If the school were concerned that younger children still might be confused, it could use the opportunity as a first civics lesson and explain to them, in age-appropriate terms, its neutral position. Even young children understand the concept of neutrality from the role of referees and umpires in sports and playground games, and Respondent could describe its role in similar terms. *See also Good News/Sports Club*, 28 F.3d at 1509

(distinction between public speech and private speech "not a difficult concept"). In short, the constitutionally preferred remedy in this situation is "more speech"[5] with reasonable, viewpoint-neutral measures — not censorship.

B. Censoring Petitioners' Religious Viewpoint Suggests Governmental Hostility Toward Religion.

In *Mergens*, a plurality of the Court observed that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248.[6] Respondent's discrimination against the Good News Club presents just such a situation and communicates the same message — hostility toward religion. Even school-aged children cannot be expected to ignore this hostility and discrimination.

Indeed, the message of hostility toward religion is all the more troubling due to the age of the children involved. This Court has cited the impressionability of young children as supporting the need to safeguard against the appearance of governmental sponsorship of religious activity. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578,

---

[5] *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[6] *Cf.* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785) ("the Bill violates equality by subjecting some to peculiar burdens"), *reprinted in Everson* v. *Board of Educ. of Ewing*, 330 U.S. 1, 66 (1947) (appendix to dissent of Rutledge, J.); *id.* ¶ 9 ("It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissent of Rutledge, J.).

584 (1987); *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 385 (1985), *overruled*, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997). When the government's message is one of hostility toward religion, however, impressionable children are equally harmed.

The Constitution "forbids hostility toward any" religion. *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984). By excluding the Good News Club from facilities available to the Boy Scouts, Girl Scouts, and 4-H Club, Milford demonstrated unconstitutional hostility toward religion. A message of hostility toward religion harms impressionable young children who may be led to believe that their government does not like religion or that their government thinks religion is bad for them. Such a message can be avoided through a policy of neutrality and even-handed treatment.

IV. PUBLIC OFFICIALS NEED CLEAR GUIDANCE AND WORKABLE RULES TO UPHOLD GOVERNMENTAL NEUTRALITY TOWARD RELIG-ION.

Public school officials and other governmental officers who oversee public facilities routinely handle requests from a variety of groups, including religious organizations, to use government facilities. These officials, most of whom are not lawyers, need clear channel markers if they are to navigate between the Free Speech Clause on one hand, and the Establishment Clause on the other.

In *Widmar*, *Lamb's Chapel*, and *Rosenberger*, this Court set out those markers, placing certain inquiries beyond the authority of governmental officers. In so doing, the Court clarified (and simplified) the duties of public officials faced with requests from religious

organizations to use public facilities. These officials were required to review the purposes for which their facilities could be used, determine if the religious organization wished to use the facility for one of those purposes, and *then treat the religious organization just like any other group*. The officials were not given the Sisyphean task of distinguishing between religious "speech" and religious "worship." *Widmar*, 454 U.S. at 269–70 & n.6, 272 n.11. They were *not* to evaluate the organization's materials to see if they were sufficiently secular. *Cf. Rosenberger*, 515 U.S. at 845–46. There was to be no endorsement of religion, but neither was there to be any discrimination against religion.

Hoping to promote better understanding of this Court's Establishment Clause jurisprudence, particularly in the context of religious activities in public schools, various organizations and governments have issued guidelines to assist public officials in understanding their obligations. For example, beginning in 1997, the Attorney General of Alabama issued *Guidelines for Religious Activities in Schools* to public school officials in Alabama. Recently revised after the decision in *Santa Fe Independent School District* v. *Doe*, these *Guidelines* address, *inter alia*, the use of public school facilities by private religious organizations. The Alabama *Guidelines* state:

> Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, *subject to the same limitations placed on non-religious meetings.*

App. A, *infra*, at 5a (emphasis added). With respect to private baccalaureate services, the *Guidelines* similarly provide:

> If a school by policy and practice rents out its facilities to private groups, it must rent them out *on the same terms and conditions*, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.

Id. at 6a (emphasis added). The Alabama *Guidelines* stress the requirement of governmental neutrality toward religion:

> Teachers and school administrators *must demonstrate and observe neutrality* with regard to private baccalaureate services and school officials *may neither encourage nor discourage* student attendance at such events.

Id. (emphasis added).

The Department of Education of the Commonwealth of Virginia issued *Guidelines Concerning Religious Activity in the Public Schools* in 1995. The Virginia *Guidelines* contain advice similar to the Alabama *Guidelines*:

> 60. Once the school district opens its facilities for use by students or community groups during non-school hours, the Free Speech clause of the First Amendment generally requires that the school district not discriminate based on the point of view of groups seeking equal access to those facilities. The denial of access to religious groups can constitute viewpoint discrimination in violation of the Free Speech Clause of the First Amendment.
>
> 61. Use of school facilities by religious community groups after school hours should be granted on the same basis as other nonreligious

> community groups. A group may not be denied use of meeting space solely because its speech, purpose or identity is religious.

App. B, *infra*, at 34a–35a (citations and footnotes omitted).

The United States Department of Education was among the first to issue such guidelines, entitled *Religious Expression in Public Schools*, and has distributed them to every public school in the nation. These federal guidelines contain similar advice regarding the use of public school facilities after hours by private religious groups:

> If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

App. C, *infra*, at 66a. The federal guidelines similarly underscore the importance of official neutrality in religious matters:

> *Official neutrality regarding religious activity*: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Id.

These guidelines evidence the substantial efforts public officials are making to explain and uphold this Court's Establishment Clause jurisprudence. In particular, public officials in State and Federal government are attempting to explain and promote governmental *neutrality* in the context of free speech and religious activities. Unfortunately, the decision of the Second Circuit undermines these efforts.

This Court has repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. 839 (citing *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274–75). The Court has similarly rejected the suggestion that public officials should exclude religious organizations simply because their mode of expressing their views and beliefs may take the form of singing religious songs, prayer, reading scripture, or proselytization. *See Widmar*, 454 U.S. at 269–70 n.6; *Rosenberger*, 515 U.S. at 844–45. A common theme throughout this line of cases, both in the Court's Free Speech Clause analysis and in its Establishment Clause analysis, has been governmental neutrality — neutrality toward varying viewpoints and neutrality toward varying religions and religious traditions.

Neutrality is a concept governmental officials can understand. It is a concept governmental lawyers can explain. Of course, that is not to say that applying the principle of neutrality is always easy given the innumerable factual situations governmental officials face every day. The appropriate course of governmental action is not always obvious, but a clear rule of neutrality goes a

long way toward pointing public officials in the right direction. In this case, the *amici* States urge the Court once again to underscore the principle of governmental neutrality that lies at the heart of its decisions in *Widmar*, *Lamb's Chapel*, and *Rosenberger*.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

BILL PRYOR
Attorney General of Alabama
MARGARET L. FLEMING
JOHN J. PARK, JR.
CHARLES B. CAMPBELL*
Assistant Attorneys General
*Counsel of Record**

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

(Additional Counsel listed
on Inside Front Cover)

APPENDIX A

[Seal]
State of Alabama
OFFICE OF THE ATTORNEY GENERAL

Bill Pryor
Attorney General

Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

July 21, 2000

M E M O R A N D U M

TO: All City and County Superintendents of Education

FROM: Bill Pryor, Attorney General
Michael R. White, General Counsel, State Department of Education

RE: Updated Guidelines for Religious Activities in Schools

A joint memorandum to all superintendents regarding permissible religious activities in public school settings was sent to you on December 8, 1997. On April 13, 1998, you received Guidelines for Graduation Exercises and Baccalaureate Services. On July 29, 1999, after the decision by the United States Court of Appeals in *Chandler v. James*, we wrote a joint memorandum to update the Guidelines based upon the decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals. We now write again to update the Guidelines based upon the Supreme Court's recent

decision in the case of *Santa Fe Independent School District v. Doe*.

In *Santa Fe Independent School District v. Doe*, the Supreme Court ruled that a Texas school district could not organize a student election to select a student to give an invocation before high school football games. Our Guidelines already indicated that "[o]rganization or direction of a prayer by a school official would not be appropriate," so this new decision has not required a change to the Guidelines. We have merely added statements to explain that the prohibition on "organization or direction of a prayer" means school officials should not hold a student election for the purpose of selecting a student to give a prayer at school-sponsored sporting events. We advise that this same rule should apply to school-sponsored activities generally, including commencement/graduation exercises. This does not, however, prohibit regularly scheduled student speakers, such as a valedictorian or class president, from praying, reading scripture, or making religious comments in the course of their speeches. As the Eleventh Circuit Court of Appeals held in *Chandler v. James*, such "genuinely student-initiated religious speech" is protected by the First Amendment.

As you may remember from our July 29, 1999, Memorandum, the Permanent Injunction issued by Judge DeMent against the DeKalb County school system in the *Chandler v. James* case was vacated and remanded by the Eleventh Circuit Court of Appeals. The Court found that "genuinely student-initiated religious speech" may not be suppressed nor restrictions applied "on the time, place, and manner of that speech which exceed those placed on students' secular speech." The Supreme Court has vacated that decision and ordered the Eleventh Circuit to

reconsider the case in the light of its new decision in the *Santa Fe* case. We believe the Eleventh Circuit's decision is consistent with the outcome in *Santa Fe*, and that the Court's opinion will not be significantly modified. In any event, we will inform you as soon as the Eleventh Circuit rules.

As before, we believe these Guidelines should enable you to ensure that students can fully exercise their First Amendment rights in an environment that does not conflict with the Establishment Clause.

GUIDELINES FOR RELIGIOUS ACTIVITIES IN SCHOOLS

Introduction

The following guidelines are issued to provide assistance to public school administrators and teachers. These guidelines are based on the rules reiterated by the Eleventh Circuit Court of Appeals in *Chandler v. James* and in opinions of the United States Supreme Court. These guidelines are intended to be instructive and not all-inclusive.

Permissible Activities in General

- Students may voluntarily engage in individual or group prayer during non-instructional time or at school-sponsored events. This includes individual or group prayer before or after athletic events. School officials (e.g. coaches) should neither encourage nor discourage individual or group prayer. Organization or direction of a prayer by a school official would not be appropriate; this also means that school officials should not hold a student election for the purpose of choosing a student to give a prayer at a school-sponsored event.
- Students may voluntarily engage in religious discussions during non-instructional time or at school-sponsored events. Students may speak to and attempt to persuade their peers about religious topics just as they do with regard to political or other topics.
- Students may express religious beliefs in reports, homework, artwork, and other written and oral assignments, which should be judged by ordinary academic standards of substance and relevance.

- Private citizens (including students) may distribute religious literature in accordance with all applicable time, place and manner restrictions applicable to the distribution of literature that is unrelated to school curriculum activities.
- Students may display religious messages or symbols on items of clothing (e.g., cross, menorah, Star of David, etc.) to the extent that they may display comparable non-religious messages or symbols on items of clothing. Students also may wear particular attire (e.g., yarmulkes, head scarves, etc.) during the school day or at school-sponsored events as part of the students' religious practices consistent with board policies and State law.
- Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, subject to the same limitations placed on non-religious meetings.
- Students in secondary schools may have announcements of meetings of a religious nature conveyed in the same manner that announcements are made for meetings of other non-religious groups (e.g. public address system, school newspaper, etc.).
- Teachers may teach about religion, including the Bible and other scripture, provided that such teaching concerns the history of religion, comparative religions, the Bible (or other scripture) as literature, and/or the role of religion in the history of the United States. The use of religious symbols (e.g., cross, menorah, symbols of Native American religions) is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious subject being taught.

- A fixture or symbol that is traditionally associated with a particular religion (e.g., nativity scene, menorah, etc.) may be included as a "prop" in a school holiday production to the same degree that non-religious props are used in school productions, provided such symbols are displayed as an example of the cultural and religious heritage of the holiday.
- Traditional holiday music may be included in school productions (e.g., choral events, band activities, etc.) in keeping with the cultural or religious heritage of the holiday.

Special Considerations for Commencement/Graduation

Baccalaureate Services

- If a school by policy and practice rents out its facilities to private groups, it must rent them out on the same terms and conditions, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.
- Teachers and school administrators must demonstrate and observe neutrality with regard to private baccalaureate services and school officials may neither encourage nor discourage student attendance at such events.
- Teachers and school administrators may attend such functions in their individual capacities.
- Baccalaureate services are to be announced or advertised in the same manner as other non-religious meetings, such as notices in the school newspaper or use of the public address system and bulletin boards.

Commencement Exercises

- Student-initiated religious speech is permitted; however, school officials are not to encourage, organize, or direct such speech. This also means that school officials should not hold a student election to choose a student to give a prayer at school-sponsored commencement exercises.
- Regularly scheduled student speakers (e.g., valedictorian, salutatorian, class president) may make religious comments during their speeches. School officials are not to encourage or direct such speech.
- Religious persons and/or organizations are entitled to advertise in school commencement programs/ directories on the same terms as other persons or community organizations.

The intent of these Guidelines is to outline a course of study, conduct, and related activities that does not prescribe directly or indirectly a single religion, belief, or observance and that is consistent with the prevailing decisions by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Any questions regarding the above Guidelines or conduct that is not specifically detailed above should be directed to the Office of the Attorney General, Bill Pryor, or the General Counsel for the Department of Education, Mike White.

APPENDIX B

[Seal]

Board of Education's Guidelines Concerning Religious Activity In The Public Schools

WHEREAS, the 1994 General Assembly enacted Va. Code § 22.1-280.3 requiring the Board of Education, in consultation with the Office of the Attorney General, to develop Guidelines on constitutional rights and restrictions relating to religious expression in our public schools; and

WHEREAS, such Guidelines are not intended to be regulations displacing local discretion and determination, but as technical assistance outlining relevant constitutional and statutory principles for consideration by local school authority; and

WHEREAS, in accordance with Va. Code § 22.1-280.3, the Board of Education provided broad-based opportunity for input from the general public, teachers and local school boards, before establishing Guidelines.

NOW, THEREFORE, BE IT RESOLVED that the Board of Education hereby adopts the attached Guidelines and directs that they be disseminated to the public schools of this Commonwealth and made available for public distribution.

Adopted this 22nd day of June, 1995.

s/ James P. Jones	s/ William C. Bosher, Jr.
James P. Jones	William C. Bosher, Jr.
President, Board of Education	Superintendent of Public Instruction

Board of Education's Guidelines Concerning Religious Activity In The Public Schools

Introduction

1. These Guidelines are not intended as regulations or state policies displacing local discretion. These Guidelines are designed instead as technical assistance for consideration by local school officials, administrators and teachers in formulating their local policies and decisions. They have been adopted following public hearings throughout the Commonwealth and after opportunity for comment and input from the general public, teachers, school administrators and school boards, parents and students, and interested organizations.

2. These Guidelines do not purport to provide definitive answers to all of the possible issues and the varied circumstances as may exist in the public schools. Indeed, the United States Supreme Court has cautioned that decisions in this area are particularly fact-sensitive. In that regard, local school consideration should also take into account the attached memorandum prepared by the Office of the Attorney General, dated January 9, 1995. That memorandum sets forth the conceptual framework in the law generally applicable and governing in most situations.

Guidelines

3. One can imagine a number of situations in which private individuals might engage in religious expression or practices. They might pray before school, during school, or during extracurricular activities; they might wear religious attire or clothing with a religious message. They might carry the Bible or other sacred texts with them in school; they might attempt to evangelize or

proselytize other students. The religious beliefs of some students may cause their parents to request that they be excused from holiday celebrations, holiday pageants, physical education or a curriculum which violate sincerely held religious convictions.

4. The public schools should thoughtfully consider any religious objection to its practices or policies made by parents or students. School authorities should determine whether exemptions or exceptions to their policies and practices can be provided in the interest of reasonably accommodating sincerely held religious beliefs.

Curriculum

5. Students should be excused from school to attend religious services or observe religious holidays. Manifestly, any requested absence must be in conformity with local school procedures, including parental or guardian approval as necessary.

6. The public schools are not required to conform their curriculum to every religious tenet or objection. On the other hand, while the curriculum must not be designed to promote religious belief or non-belief, it need not be sanitized of all religious references or themes which may appear in educational materials. While the precise contours of their rights have not been judicially defined, parents and students also have constitutional rights — at least in some circumstances — to exemption from assignments, materials or programs that substantially burden their religious tenets. Thus, public school authorities should thoughtfully consider whether suitable alternatives are available that would allow students to opt-out of any program in which participation would substantially burden their religious tenets. Where such a burden occurs and public school authorities cannot

show a compelling interest in requiring attendance, the student must be allowed to opt-out.[1]

7. As provided by state law, local school boards must excuse from school attendance "any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Virginia law provides however that "bona fide religious training or belief does not include essentially political, sociological or philosophical views or a merely personal moral code." *See* Va. Code § 22.1-257. Also, Virginia law authorizes home instruction as an alternative to public schooling under certain conditions. *See* Va. Code § 22.1-254.1. When the requirements of home instruction have been met, instruction of children

---

[1] These rights of parents and students are granted in the Free Exercise and Free Speech Clauses of the First and Fourteenth Amendments. The Religious Freedom Restoration Act may also provide similar protection. Opt-out or excusal as an accommodation to free exercise concerns has been looked upon favorably by the courts. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1533 (9th Cir. 1985) (Despite finding of a [*sic*] free exercise burdens inherent in making child read textbooks which espoused views contrary to her family's faith, no constitutional violation as student was excused from reading offensive book and assigned an alternative book); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (parents of school children successfully challenged the mandatory use of textbooks which contained religiously objectionable references); *Mozett v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (requiring students to be simply exposed to objectionable ideas in standard curriculum did not impose substantial burden on religion without proof that the student was required to conform or take some action contrary to their religious belief); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (dismissing challenge to supplemental reading program which contained offensive references to "witches, giants and sorcerers" and arguably suggested pagan themes).

by their parents in their home is an acceptable form of education under the policy of the Commonwealth of Virginia.

8. School personnel, including teachers, shall not lead their classrooms in devotional exercises whether directly in class or over a public address system.[2] A school official or teacher also shall not ask or designate a student volunteer to lead the class in a devotional exercise.[3]

9. Our United States Supreme Court has however aptly recognized that public education may not be complete without a study of our religious heritage or an objective comparison of our religious pluralism. *School Dist. v. Schempp*, 374 U.S. 203 (1963). When presented objectively as part of a secular program of education, the public schools may offer courses in comparative religion, study the history of various religions and their relationship to civilization, as well as the historic and literary qualities of religious materials. Religious music may also be included in music classes, religious art may be included in art and humanities classes, the Bible and other religious texts may be studied in literature classes, and literature dealing with religious themes may be used in language arts development. School and classroom libraries may also include books with religious themes.[4]

---

[2] *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

[3] *B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

[4] In *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989), a federal court, in refusing to remove a Bible from a public school library stated: "In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library. The Bible is regarded by many to be a major work of literature, history, ethics, theology and

If the school offers a course specifically studying the Bible or other religious texts as literature, the course should be taught like other courses offered at the same grade level. The material must be balanced and objectively taught without attempt to indoctrinate religious belief or non-belief. Teachers of the course should be assigned using objective standards without any religious test.[5] Discussion of religious topics or materials should be relevant to the curriculum and should not occupy a disproportionate amount of classwork. Course work should not include participation in a religious ceremony of any kind during or outside of class.[6] Schools should also be mindful of their students' diversity of religious beliefs.

10. Religious symbols or religious texts, such as the Ten Commandments, may not be posted in the public schools when the purpose or primary effect is to advance religion, but may be posted on a temporary basis as part of an academic lesson or curriculum. The public schools, however, may properly teach students important values, ethics and morality, but not through religious indoctrination. The Ten Commandments, the Bible, as well as other religious materials may be studied for bona fide educational purposes.

---

philosophy. . . . To deprive a public school library's collection of the Bible would, in the language of Justice Robert Jackson, render the educational process 'eccentric' and incomplete." *Id.* at 1513.

[5] *Crockert v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983); *Vaughn v. Reed*, 313 F. Supp. 431 (W.D. Va. 1970).

[6] *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979), finding that student participation in transcendental meditation ("TM") exercise constituted an establishment or religion in violation of the First Amendment.

Free Time

11. During most of the school day, the attention of students is properly directed toward activities forming part of the school curriculum or co-curriculum. There are, however, other periods of the school day when students are generally free to read on their own, or to gather together and/or talk among themselves about subjects of their own choosing. While such non-instructional periods may vary from school to school, they typically include, but are not necessarily limited to (i) riding to and from the school on the school bus, (ii) a period each morning between the time students are permitted on school grounds and the time they are required to be present in their seats, (iii) lunch time, (iv) recess in the lower grades, and (v) in the upper grades, brief periods between classes.

12. During such free time, students should be free to read religious literature of their own choosing, and to discuss religious themes with other willing students on the same basis as they might discuss secular interests and subjects.

13. Student-initiated and non-disruptive devotional activities during free time, such as "meet me at the pole" events prior to school, should be permitted. Teachers and school officials must not encourage or discourage participation by students in such events. The public schools however have the right and responsibility to protect public property and preserve order and determine the school facilities and permissible locations authorized for such activity. Such decisions should be made and applied evenly without favoring or discriminating against the activity solely because of its religious nature.

14. Similarly, if a school conducts a study period or provides other times in which students are allowed to

read materials other than those prescribed by the school curriculum, the students must be free to read religious material, not just secular material.

Student Dress

15. Students will sometimes express their religious convictions on their clothing or personal effects. For example, a Christian girl may wear a necklace bearing a cross, while a Jewish girl may wear a necklace displaying a Star of David. Students may also wear T-shirts bearing religious messages.

16. In the absence of disruption to school activities, obscenity or lewdness, these and other expressions of belief will generally constitute protected speech. Public school personnel may not discipline students because they disagree with the underlying message, but may take reasonable action needed to promote order and address any disruptive *effects* of such student speech. A school may adopt a content-neutral dress code that uniformly prohibits certain kinds of clothing altogether; provided, a dress code does not single out or discriminate against religious expression. For example, schools may determine that T-shirts are not appropriate attire and apply the policy evenhandedly to all such apparel. Schools should attempt, however, to accommodate student's religious attire as well as religiously based modesty concerns (*e.g.* in physical education classes).

Student Assignments

17. Student art projects often center around seasonal themes. Where the season has both secular and religious connotations, some students may prefer to depict a secular aspect of the season, while others may prefer to depict a religious aspect.

18. So long as the expression is germane to the assignment, teachers should not discriminate against students who prefer a religious theme or viewpoint over a secular one (or vice versa). Example: Where different students depict a manger scene, a menorah and "Frosty the Snowman," the teacher may display them all on an equal basis, or on the basis of their artistic merit, but may not discriminate in favor or against any of them on the basis of the religiosity or secularity of their themes. Students have a right to express their religious values and viewpoints in their classwork, assignments and work products to the same degree that students may express secular viewpoints. A student's grade or evaluation must never be affected by his or her creed or religious belief or non-belief.

Distributions of Religious Literature

19. Students should be permitted to distribute religious material during school on the same or equal basis as non-religious material. *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189 (Colo. 1989) (peaceful student distributions of religious literature at school protected by the First Amendment). The schools may however reasonably regulate the time, place and manner of such distribution. *Hedges v. Wauconda Comm. Sch. Dist.,* 9 F.3d 1295 (7th Cir. 1993). (Merely permitting an eighth grader to distribute religious literature to peers before class without disruption did not raise Establishment Clause concerns).

20. Schools should not grant community groups or individuals from outside the school special access to the students during the school day for purposes of proselytizing or distributing proselytizing literature to students. *See, e.g., Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir.), *cert. denied*, 113 S. Ct. 2344, 124

L. Ed. 2d 254 (1993). A long line of Supreme Court precedents establish that it is impermissible for school officials to allow the machinery of the state to be used to provide an audience for religious exercises or instruction by outside groups. *See Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962). In disapproving access to students by religious organizations, the Court, in *McCollum*, stated that:

> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery.

333 U.S. at 212.

21. Community groups have no right to enter the school grounds to distribute materials to students during the school day. Where the school elects to allow such distribution by some community groups for nonsectarian purposes, the law is still developing with regard to affording equal access to community groups to distribute religious materials in the public schools. Policy in this area should consider the manner, time and location of the distribution and whether there is risk that impressionable children will perceive official school endorsement of the material.[7]

---

[7] *See Good News/Good Sports Club v. School Dist.,* 28 F.3d 1501 (8th Cir. 1994), *petition for cert. filed*, No. 94-1299, 63 USLW 3583 (January 26, 1995) (school district engaged in viewpoint discrimination by denying access to a religious community group

Holidays

22. Public Schools have traditionally acknowledged a wide variety of holidays, some with religious origins and significance. Teachers and students typically prepare displays, study the origin of holidays and participate in plays or concerts. Administrators and teachers should fundamentally be sensitive to "inclusion" not "exclusion" of students holding diverse religious viewpoints.

23. A public school may recognize holidays also having religious significance to some (e.g., Christmas and Easter). While these holidays have religious origins and retain a religious significance, they have also become part of our national culture and heritage. The religious significance should not, however, be promoted or sponsored. Case law suggests that context can be important to assure fair balance and sensitivity to all students. A musical program consisting solely of religious music, for example, is more problematic than a program that combines religious and secular music. *See R.J.J. v. Shineman*, 658 S.W.2d 910, 913 (Mo. Ct. App. 1983) (winter holiday concert constitutional where seasonal numbers such as "Jingle Bells" performed along with Christmas carols). *See also County of Allegheny v. ACLU*,

---

meeting with students after school, while permitting an allegedly nonreligious community group to meet with students on the same topics); *Sherman v. Community Consol. Sch. Dist.* 21, 8 F.3d 1160 (7th Cir. 1993) (no establishment clause violation when school division allowed the Boy Scouts, which requires all members to affirm belief in God, to use elementary school facilities for meetings and to distribute flyers and posters through the school); *Schanou v. Lancaster County Sch. Dist.,* 863 F. Supp. 1048 (D. Neb. 1994) (Gideons permitted to distribute Bibles after school to students on sidewalks on school property where other groups also allowed to distribute their literature).

492 U.S. 573 (1989) (display of menorah next to Christmas tree acceptable whereas display of creche alone unacceptable); *Lynch v. Donnelly*, 465 U.S. 668, at 680 (1984) (context of creche display critical). Moreover, public school personnel should be animated by secular motives or goals — not by a desire to subtly indoctrinate.

24. A school may also teach its students objectively about religious holidays, including their religious significance, without offending the Establishment Clause when presented as part of a secular education program. *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied,* 449 U.S. 987 (1980). In *Florey*, the court upheld a school's holiday policy, noting that it is constitutionally permissible for a school to "advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization." *Id.* at 1314 (quoting policy). *See also Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993) which considered the constitutionality of a school board's policy regarding "the use of cultural, ethnic, or religious themes in our educational program." *Id.* at 932. The court upheld the policy for a variety of reasons, observing that "the use of appropriate classroom and central displays is clearly a recognized and legitimate educational technique." *Id.* at 939.

25. Any student should always be permitted to opt out of holiday-related events and programs because of strongly held religious sentiments.

26. Devotional or strictly religious exercises must be avoided.

27. Whenever feasible, schools should strive to avoid scheduling exams and special events on days when it is

foreseeable that some students will be absent to celebrate religious holidays. Similarly, if a school gives awards for perfect attendance, it should not withhold such recognition from students whose only absence is necessitated by holidays where observance is prescribed by the student's faith.

The Equal Access Act

> *(The Equal Access Act) means that the school will have the same regulations for a religious club as for any other club, no more, no less.*
>
> Senator Mark Hatfield

28. School officials should be familiar with the federal Equal Access Act (20 U.S.C.S. §4071, *et seq.*). The Act guarantees, under certain circumstances, student religious and Bible study groups equal access and opportunity to conduct meetings in the secondary public schools on the same basis as other noncurriculum related student groups. *See* Attorney General's attached memorandum. Congress' primary purpose in passing the Act, according to the Supreme Court, was to end "perceived widespread discrimination against religious speech in public schools." *Mergens*, 496 U.S. 226, 239 (1990). While Congress recognized the constitutional prohibition on governmental promotion of religion, it also believed that nonschool-sponsored student speech, including religious speech, should not be excised from the school environment.

29. There are three basic Guidelines under the Equal Access Act:

30. The first is *nondiscrimination*. If a public secondary school permits student groups to meet for student-initiated activities not directly related to the school curriculum (such as chess club, ski club, scuba

club, etc.), it is required to provide equal access on the same basis to religious groups. The school cannot discriminate against any students conducting such meetings on the basis of the religious, political, philosophical, or other content of the speech at such meetings. Religious speech and expression are to receive equal treatment.

31. The second basic concept is protection of student-initiated and student-led meetings. Student-initiated means that the students themselves, without influence or promotion by school personnel, seek to meet and that the students will direct and control the religious discussion without governmental participation.

32. The third basic concept is *local control*. The public schools may apply content-neutral disciplinary rules to avoid disruption, or reasonably regulate the time, place and manner of such meetings. For instance, a school may establish a reasonable time period for meetings on any one school day, a combination of days or all school days. It may assign rooms, and enforce student discipline codes.

33. To comply with constitutional and statutory law, the public schools must allow religious student groups equal access to meeting room facilities and other locations at school as made available to noncurriculum student groups. Similarly, religious student groups should have equal access to facilities made available to noncurriculum student groups to announce their meetings. These may include, for example, the student newspaper, bulletin boards, the public address system and club fairs. Where a religious group is the first noncurriculum group to apply for such access, the school may allow such group access provided that it adopts a policy that would also allow non-religious noncurriculum groups equal access. The right of a lawful, orderly student group to meet, however, cannot

depend on the approval of other students and cannot be denied because other students object to their access. A student group should not be denied equal access merely because its views are unpopular.

34. Public school authority may also not retaliate against any student or teacher because of his or her association with a religious organization.

Teacher Expression of Religion

35. As public employees, and agents of the public schools, the speech rights of teachers are not absolute and must be balanced against the school's legitimate right and duty to maintain order, perform its obligations to the population served, and avoid government sponsorship of religion. Teachers must be cognizant of their great influence in shaping student values and their overarching duty not to use their position to indoctrinate students into their religious beliefs or lack thereof.

36. As a general matter, neither the Free Exercise nor Free Speech clauses provide teachers an unqualified right to engage in religious expression with students at school. Because teachers play a central role in setting values for our children, they must also bear responsibility for their actions which impermissibly create a danger of establishing religion in the public schools, including misapprehension by pupils that the public schools sponsor the teacher's viewpoint. Teachers should not lead students in devotional activities during class or school-sponsored activity, or encourage students to participate with the teacher in religious activity before or after school. A teacher who wishes to participate in voluntary student, religious activity during free time should be careful that his or her participation is not misinterpreted by students as official sponsorship of religious belief. The

circumstances of each case, including the maturity of the students and the context and duration of the event must be professionally considered.

37. A teacher may respond honestly, in a noncoercive, and nonindoctrinating manner, to student-initiated inquiries about religion, just as a teacher may respond in an appropriate manner to student inquiries about political, philosophical or other secular interests. Balance, degree and fairness are important considerations, and the specific question may best be answered by referring the student to his parents.

38. Teachers should be able to meet with other teachers for private religious speech, including prayer, meditation and reading of religious materials, during their free time, such as immediately before or after class or during breaks or lunch. As professionals, teachers need to be careful however that their actions are not misinterpreted by students.

Moments of Silence

39. The Code of Virginia (§ 22.1-203) authorizes the school board of each school division to establish the daily observance of one minute of silence in each classroom of the division. In establishing policy, the school board must be careful that its policy is animated by secular justifications, not merely as a pretense to encourage prayer.[8] Public schools may provide students, for

---

[8] *Cf. Wallace v. Jaffree*, 472 U.S. 38 (1985); *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985). In *Jaffree*, Alabama's moment of silence statute was invalidated by the U.S. Supreme Court, partly because legislative record evidenced primarily religious, rather than secular purpose. Virginia's statute can be defended as promoting lawful goals, and not simply to endorse religion. Care must be taken that it is administered neutrally.

example, with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. A brief minute of silence may also fulfill other secular objectives, including maintenance of discipline.

40. The teacher must ensure that all pupils remain seated and silent and make no distracting display to the end that each pupil in the exercise of his or her individual choice and consistent with freedom of conscience, may engage in any silent activity (including prayer) which does not interfere with, distract, or impede other pupils in the like exercise of individual choice. The teacher may say the following, for example, before stipulating a minute of silence: "We will now observe a minute of silence. You may, in the exercise of your individual choice, meditate, pray or engage in any other silent activity which does not interfere with, distract or impede other pupils. You must remain seated and silent."[9]

41. The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. The teacher should also not use the time to pray aloud in front of other students, nor permit any other student, or group of students to pray aloud.

Graduation Prayer

School Initiated Prayer, Class Initiated Prayer

42. It is firmly settled in the law that the Establishment Clause forbids school-sponsored prayer or religious indoctrination, as well as any school initiative designed to endorse prayer generally or sponsor a

---

[9] This language is drawn from § 22.1-203 of the Code of Virginia.

particular religious viewpoint. In 1992, the United States Supreme Court held in *Lee v. Weisman*, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), that school sponsored prayer, even nonsectarian and nonproselytizing prayer, at graduation ceremonies violated the Establishment Clause.

43. In *Weisman*, the participation and involvement of school personnel was pervasive in deciding whether there would be a religious invocation, selecting the speaker and even dictating the contents of the invocation through a pamphlet setting forth guidelines for "nonsectarian" prayer. In deciding that such pervasive involvement by school personnel was unconstitutional, a divided Court (5-4) remarked:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory.

112 S. Ct. at 3655, 120 L. Ed. 2d at 480.

44. The Court was concerned not only with the pervasive degree of school participation in religious matters, but also with the resulting subtle coercive pressures that accompany any official religious observance as part of a school-sponsored event. The argument that the ceremony was "voluntary" was rejected by the majority over the objections of the dissenting Justices. Even though objecting students were not required to attend graduation to receive their diplomas,

such attendance was "in a fair and real sense obligatory." *Id.* at 2655, 120 L. Ed. 2d at 480. As the Court observed:

> Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions ... Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the word "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id. at 2659, 120 L. Ed. 2d at 486.

45. Nothing in *Weisman* would prohibit students from themselves organizing a privately sponsored baccalaureate service before or following the graduation ceremony off the school grounds. *See* 112 S. Ct. at 2677, 120 L. Ed. 2d at 508.

46. Devotional exercises at school sponsored events do not become constitutional simply by excusing objecting students from attendance.

47. The decision in *Weisman* has produced a split in the lower courts over the constitutionality of class-initiated, student led prayer at graduation ceremonies. This issue will necessarily be uncertain in the law until resolved by the United State Supreme Court. For example, a federal appeals court in Texas approved a school board's policy allowing graduation prayer where a majority of the graduating class voted for "neutral" prayer by a student volunteer. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F. 2d 963 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993). In *Jones*, unlike *Weisman*, school personnel neither made the decision to

include a religious invocation or to supervise the delivery and preparation. They merely abided by the collective decision of the senior class, as expressed through a vote. The Fifth Circuit reasoned that the Establishment Clause is a restraint on government and not when prayer is "the result of student, not government choice." *Id.* at 968. Other lower courts have used reasoning similar to the Fifth Circuit's.[10] However, there is also a substantial body of case authority to the contrary, including a decision by the Ninth Circuit that rejected the rationale in *Jones* and reached the opposite result, holding that when school officials "delegate" a decision on prayer to a vote of the senior class, the resulting election in favor of prayer is still state-action. *Harris v. Joint Sch. Dist. No. 241*, 41 F. 3d 447 (9th Cir. Nov. 18, 1994). A similar result was reached by a federal district court enjoining the Loudoun County public schools from permitting student led and initiated prayer at graduation ceremonies. *See Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993) (declaring that organized prayer at a high school graduation is inherently divisive and unconstitutional no matter who inspires and delivers

---

[10] *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (validating nonsectarian student led and initiated invocation); *Adler v. Duvall Co. Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994) *argued orally*, #94-2638 (11th Cir., March 7, 1995); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991) (finding that religious invocation was ceremonial in nature without evidence of coercion); and *Grossberg v. Deuschio*, 380 F. Supp. 285 (E.D. Va. 1974) (holding that brief nonsectarian prayer did not substantially burden religious liberty).

the invocation).[11] Only the Loudoun County public schools are bound by *Gearon*.[12]

48. The Supreme Court has not decided a case presenting the specific question whether religious invocations may be permitted when they result solely

---

[11] *See also ACLU v. Blackhorse Pike Regional Bd. of Educ.,* No. 93-5368 (3d Cir. June 25, 1993) (unpublished opinion); *Friedmann v. Sheldon Community Sch. Dist.,* No. 93-4052 (N.D. Iowa May 28, 1993), *reversed on standing grounds*, 995 F.2d 802 (8th Cir. 1993). The reasoning in these cases follows decisions in other analogous contexts. In *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981), the Ninth Circuit Court of Appeals held that student-initiated and led prayer at school assemblies was unconstitutional; in *B. v. Treen*, 635 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), the Court held that student volunteers could not lead classmates in prayer even though objecting students could be excused; and in *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160 (5th Cir. 1993), the Court invalidated the practice of offering prayers before a high school basketball game. In *Doe*, the Fifth Circuit stated that *Weisman* "is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or-initiated religious expression or indoctrination." *Id.* at 165.

[12] Injunctive orders bind only the litigating parties, their agents and privies. *See* Fed. R. Civ. P. 65(d). While other Federal judges in Virginia would undoubtedly consider *Gearon* before ruling in a similar case, they are free to reach a different result. The principle that a decision by one federal district judge does not bind other judges — even in the same district — is amply demonstrated by a comparison of *Vaughn v. Reed*, 313 F. Supp. 431 (W.D. Va. 1970), and *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983). Judge Dalton held in *Vaughn* that an objectively-taught, mandatory, religious education program in public school would be consistent with the First Amendment. Judge Kiser, in refusing to follow the opinion of Judge Dalton, found Judge Dalton's opinion unpersuasive on that point and held that such programs must be optional. *Crockett*, 568 F. Supp. at 1431.

from a decision by the senior class through some electoral mechanism.[13] School divisions considering such policy should review existing case authority with legal counsel. Consideration includes: (1) the degree of governmental participation and oversight locally desired, (2) whether the activity results in any coercive pressure from teachers or peers on objecting students to participate at the expense of forfeiting benefits, (3) whether the activity is animated primarily by secular purposes,[14] and (4) whether the circumstances will suggest appearances of a school imprimatur, such as, for example, promotional statements in official publications or announcements. The test may very well be whether the activity, in practical effect, creates an impermissible appearance to a reasonable person that the public schools are supporting a religious perspective or viewpoint. Even in *Jones*, the court hastened to acknowledge that "we understand government to unconstitutionally endorse religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices." *Jones*, 977 F.2d at 968.

---

[13] The recent *Harris* case may furnish the Supreme Court an opportunity to resolve this issue. At the time of the adoption of the Guidelines, a petition for a Writ of Certiorari is pending.

[14] There is case authority concluding that any governmental promotion of prayer during school-sponsored event [*sic*] is necessarily motivated by impermissible religious reasons. There is also authority to the contrary where the evidence is credible proving secular motives. For example, in *Adler* the Court was persuaded on the evidence of legitimate secular motives; namely, a desire to solemnize or set a serious note for the ceremony and to respect the choices and freedom of speech of students.

Individually Initiated Prayer by a Student Speaker

49. It is often the case that one or more students from the Senior Class are selected to speak at graduation, such as the Senior Class President, Valedictorian and Salutatorian. (While discussed in terms of a high school graduation, these same considerations would apply to a graduation or promotional ceremony from middle school.) Depending on local practice, the Senior Class may also elect one or more students to speak. Unlike the case of organizing and permitting collective prayer at graduation, school personnel may not censor a student who voluntarily chooses, on his or her own initiative, to include religious themes or references, including prayer, in a graduation address. If a student speaker elects on his own to use a portion of his allotted time delivering a prayer, or otherwise reflecting on the event of graduation from a religious perspective, it is not a violation of the Establishment Clause for the school to permit him to do so. Indeed, for the school to prohibit the speaker from doing so could violate his or her rights under the First Amendment.[15]

50. If the student speakers are selected by school officials (rather than by students), they should be selected on wholly secular criteria (e.g., class officers, class rank or other achievement), not based on what school officials

---

[15] While these conclusions seem plainly mandated by well-established constitutional principles, at least one federal district court appears to have reached the opposite result. *See Gearon*, 844 F. Supp. at 1100, wherein Judge J. Bryan banned all graduation prayers in the Loudoun County public schools. Due to financial constraints the local school board did not appeal this case. Therefore, *Gearon* is binding on the Loudoun County public schools.

perceive as the likelihood that the speakers chosen would (or would not) pray.

51. School officials should neither encourage nor discourage them [*sic*] students from including a religious reference or offering prayer. For the problems associated with school and class decisions about whether to have prayer, see previous section.

52. If a student speaker advises school officials of his or her intention to offer a prayer or include a religious reference, school officials may not prohibit the speaker from doing so; but, neither should they print up in their official graduation program that a prayer or religious reference is expected or will occur.

53. School officials are probably entitled to review a student speaker's prepared remarks to insure that they are germane to the event of graduation. If no prayer or religious reference is found, the school officials should not ask the speaker to include one; if one is found, school officials should not require the speaker to excise it.

Baccalaureates

54. The United States Supreme Court has never explicitly ruled on the constitutionality of a baccalaureate, but the same constitutional considerations discussed in these Guidelines apply. At least two lower federal courts have found baccalaureate services involving minimal involvement of school officials to be constitutional.[16]

---

[16] *Verbena United Methodist Church v. Chilton County Bd. of Educ.,* 765 F. Supp. 704 (M.D. Ala. 1991), found constitutional a baccalaureate service in the high school auditorium which had been designated "public forum," and where there was no evidence that

55. The public school itself may not sponsor or arrange private baccalaureates. Such religious services may always be arranged by students, parents and community groups off the school premises. If any group seeks to conduct a baccalaureate *on* premises and after hours, they can be granted use of school facilities on the same basis as may be afforded other student or community groups. The administration of the event must, however, be careful to avoid circumstances reasonably suggesting sponsorship by the public schools.

56. In order to accommodate students who may be interested in hearing about a baccalaureate service, the school may permit scheduling notices to be included on bulletin boards and over public address systems on the same basis as other scheduling notices; but care should be taken to make sure that there is no appearance of school sponsorship or official encouragement of participation. The use of disclaimers is recommended. Teachers and school administrators who choose to attend should not suggest or encourage their students to attend.

57. Teachers and school administrators may attend the baccalaureate in their capacity as private citizens, but should not plan, direct, control or supervise the ceremony.

---

school authorities created appearances of school sponsorship. In *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991), a district court upheld a school's decision to lease its auditorium to a nondenominational group for a baccalaureate service. Under the *Lemon* test, the Court found that the open access policy furthered a secular purpose; 2) the school's disclaimers disassociated it sufficiently so as not to advance religion; and 3) administrative oversight of the event did not foster excessive entanglement with religion.

Release Time Programs

58. Release time programs that permit students to attend religious instruction off the school premises have been constitutionally upheld as accommodations of the spiritual needs of our people. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). (Such programs "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs.") The mere release of students during school hours to attend religious courses is not *per se* unconstitutional. The administration of the program must be carefully managed to avoid excessive entanglement with religion. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981) (registration and record keeping of students permissible). However, the public schools should not arrange, sponsor or pay for such programs, nor seek to influence or pressure students to participate in such programs. Moreover, in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), the Supreme Court held that it was unconstitutional for a public school to permit voluntary religious instruction *on school premises* during release-time periods. School authority should not supervise the off-campus religious instruction. Agents of the religious institution should not be permitted at school during school time to recruit students to participate in their religious exercises. Public school teachers should also not recruit students for the religious instruction program. In order to avoid excessive entanglement with religion, as a general rule no academic credit should be conferred for religious instruction. *But see Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).

59. The logistics of a constitutional release time program require careful planning, knowledge of the case law in this area and attention to detail. School boards who wish to release students to attend off-school

programs may do so but should consult with their local counsel regarding registration, class location, attendance policies and class scheduling. *See, for example, Doe v. Shenandoah County Sch. Bd.,* 737 F. Supp. 913, 917, (W.D. Va. 1990); *Smith v. Smith*, 523 F.2d 121, 122 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

Equal Access By Community Groups

60. Once the school district opens its facilities for use by students or community groups during non-school hours, the Free Speech clause of the First Amendment generally requires that the school district not discriminate based on the point of view of groups seeking equal access to those facilities. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The denial of access to religious groups can constitute viewpoint discrimination in violation of the Free Speech clause of the First Amendment. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

61. Use of school facilities by religious community groups after school hours should be granted on the same basis as other nonreligious community groups.[17] A group

---

[17] *Fairfax Covenant Church v. Fairfax County Sch. Bd.,* 17 F.3d 703 (4th Cir.), *cert. denied*, 114 S. Ct. 2166, 128 L. Ed. 2d 888 (1994). *Good News Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994) (parent-led religious group has right to meet immediately after school at junior high school when Boy Scout programs are permitted to meet); *Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ. of Sch. Dist.*, 769 F. Supp. 1346 (W.D. Pa. 1991).

may not be denied use of meeting space solely because its speech, purpose or identity is religious.[18]

62. School districts may not charge religious groups a higher rental fee than nonreligious groups.[19] No rental fee may be charged religious groups if none is charged nonreligious groups.

Conclusion

63. Necessarily, all of the foregoing still requires thoughtful consideration of the pertinent circumstances. The United States Supreme Court has invariably emphasized "the importance of detailed analysis of the facts." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 226 (1948). And, while the judicial tests may vary depending upon the particular context, public school authorities should be familiar with the general concerns of the law and the dangers sought to be avoided. It is therefore important that the attached memorandum from the Office of the Attorney General be considered. It is fundamentally important that school authorities understand their constitutional duties to reasonably accommodate the religious heritage and pluralism of our people, to avoid an establishment of religion and, at the same time, not to adopt the impermissible view that any

---

[18] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

[19] *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), *cert denied*, 114 S. Ct. 2166, 128 L. Ed. 2d 888 (1994).

and all religious expression must be banished from the public school.

MEMORANDUM

TO: ALL CONCERNED

FROM: THE OFFICE OF THE ATTORNEY GENERAL

DATE: January 9, 1995

RE: ***Memorandum of Legal Principles Animating Guidelines***

These Guidelines and accompanying memorandum are not intended as regulatory displacements of local discretion, but rather as guidance to school administrators, teachers, parents and students on the relevant constitutional and statutory principles and considerations.[1]

These Guidelines and accompanying memorandum also do not purport to provide definitive answers to all of the possible issues and varied fact scenarios as may exist in our public schools. Indeed, the United States Supreme Court has invariably cautioned that decisions in this area of law are keenly fact-sensitive.

Our public school officials, administrators and teachers must, however, have a working knowledge of the laws and principles. In so doing, government responsibly promotes the cherished freedoms underlying both our federal and state constitutions. And, in so doing, lawful decision-making is promoted, minimizing public school

---

[1]This memorandum, which explains the salient legal principles governing religious expression in public schools, should be reviewed and considered by local school authorities and their counsel as background material integral to an informed understanding of specific applications in cases contained in the Guidelines.

resources being diverted to litigation defense. Such contests are not simply interesting debates on principle. Violations of protected rights may result in substantial damage awards and prevailing plaintiffs are entitled, under federal law, to reimbursement of their reasonable attorney fees. *See* 42 U.S.C. § 1988.

I. Controlling Constitutional and Statutory Provisions

A. United States Constitution

The First Amendment to the United States Constitution provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble ..."

The foregoing embodies fundamental restraints on the power of government. Under the 14th Amendment, these restraints apply not only to the "laws of Congress," but also to the policies, practices and decisions of state and local government, including public school officials, administrators and teachers entrusted with our public school system. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Engel v. Vitale*, 370 U.S. 421 (1962).

B. Constitution of Virginia (1971)

The Commonwealth of Virginia, through its own constitution, also guarantees the free exercise of religion and a corresponding prohibition on state and local government from becoming entangled in religious affairs:

> **Art. I, § 16. Free exercise of religion; no establishment of religion.** — That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by

> reason and conviction, not by force or violence; and, therefore*, all men are equally entitled to the free exercise of religion . . . . No man shall be compelled to frequent or support any religious worship,* place, or ministry whatsoever . . . *nor shall otherwise suffer on account of his religious opinions or belief;* but all men shall be free to profess and by argument to maintain their opinions in matters of religion . . . . And the General Assembly shall not prescribe any religious test whatever, *or confer any peculiar privileges or advantages on any sect or denomination,* or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry[2], but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please. (Emphasis added.)

C. Federal Statutory Provisions

The United States Congress has enacted two pertinent federal statutes: the Equal Access Act and the Religious Freedom Restoration Act.

---

[2]Virginia's Constitution prohibits appropriations of public funds to religious organizations and sectarian schools. *See* Va. Const. art. IV, § 16 and art. VIII, § 10, and *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955); *Miller v. Ayres*, 213 Va. 251, 191 S.E.2d 261 (1972); *Phan v. Virginia*, 806 F.2d 516 (4th Cir. 1986).

1. Equal Access Act, 20 U.S.C.S. § 4071, *et seq*.

The Equal Access Act basically guarantees student religious and Bible study groups equal access and opportunity to conduct meetings in the public secondary schools on the same basis as any noncurriculum-related student group.[3] The key text of the statute provides:

(a) 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, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that:
   (1) the meeting is voluntary and student-initiated;
   (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

---

[3]Congress has not defined "noncurriculum-related" student group. The United State Supreme Court has indicated that the term encompasses student groups meeting for purposes not directly related to the official curriculum; such as political clubs, chess and stamp clubs, as opposed to a French club for example. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990).

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
(5) nonschool persons may not direct, conduct, control, or regularly attend activities or student groups.[4]

2. Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb-1.

The Religious Freedom Restoration Act ("RFRA") basically prohibits government, including the public schools, from substantially burdening religion.[5] An

---

[4]Congress has further provided in subsection (D) that:

> Nothing in this title [20 USCS §§ 4071 et seq.] shall be construed to authorize the United States or any State or political subdivision thereof —
> (1) to influence the form or content of any prayer or other religious activity;
> (2) to require any person to participate in prayer or any other religious activity;
> (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
> (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
> (5) to sanction meetings that are otherwise unlawful;
> (6) to limit the rights of groups of students which are not of a specified numerical size; or
> (7) to abridge the constitutional rights of any person. . . .

[5]While any discussion of religious expression in the public schools would be incomplete without mention of this Act, it should also be noted that the Act represents an attempt by Congress to correct what

important exception is provided where "compelling" governmental interests are at stake and a "least restrictive" means is employed to further those ends. In more common parlance, public school authority must be prepared to show that its substantial burdens on religious liberty are justified by very important goals *and* that the means chosen is "least restrictive," that is, there being no less-intrusive alternative which would achieve or safeguard the governmental purposes at stake. In pertinent part, the Religious Freedom Restoration Act provides:

> (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest. . . .

42 U.S.C.S. § 2000bb-1.

D. Virginia Statutory Provisions. Virginia's General Assembly has also enacted the following:

(1) § 22.1-203. Daily observance of one minute of silence. — In order that the right of every pupil to

---

it perceives as an ill-advised constitutional interpretation by the United States Supreme Court. While this Act may be subject to challenge on grounds that it violates the separation of powers doctrine, no court has ruled on the issue so far.

the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.

Where such one-minute period of silence is instituted, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

(2) § 22.1-203.1. Student-initiated prayer. — In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil not be subject to pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, consistent with constitutional principles of freedom of religion and separation of church and state, students in the public schools may voluntarily engage in student-initiated prayer.

Va. Code § 22.1-203.1 does not legislate an exception to the First Amendment of the United States Constitution. It also reminds us that the public schools

must serve students of many faiths on an equal basis without pressure:

> [T]hat the freedom of each individual pupil not be subject to pressure from the Commonwealth, either to engage in, or to refrain from, religious observation on school grounds . . . .

Va. Code § 22.1-203.

Because of its influence in shaping values, public school authorities must be sensitive to the great variety of beliefs and non-beliefs among its pupils. Aligning the prestige, authority or resources of the public schools in support of a particular religious perspective or statement can be as polarizing and debilitating as directly interfering with religious liberty. This concern is heightened in matters of prayer. Such expressions are deeply personal and, notwithstanding the best of intentions, government may neither inhibit prayer nor sponsor prayer in the public schools. Even appearances of such sponsorship can be polarizing and confusing, and spark a constitutional challenge to perceived favoritism by public school authority. Application of the statute therefore requires basic understanding of the relevant considerations animating our First Amendment:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.

County of Allegheny v. ACLU, 492 U.S. 573, 593-594.

3. Compulsory School Attendance Statutes

State law provides for home instruction under certain conditions (§ 22.1-254.1) and further excuses children from the compulsory school attendance laws on religious grounds. School boards are expressly required to "excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Va. Code § 22.1-257(A)(2). A bona fide religious training or belief however "does not include essentially political, sociological, or philosophical views or merely a personal moral code." *See* § 22.1-257(D) and *Johnson v. Prince William County Sch. Bd.*, 241 Va. 383, 404 S.E.2d 209 (1991) (upholding school board determination that objections to compulsory attendance were essentially philosophical and not religious).

II. The Conceptual Framework In The Law

The foregoing guarantees and restrictions require government, including public school officials, administrators and teachers, to steer a "neutral course" in matters of religion. *Zorach v. Clauson*, 343 U.S. 306 (1952). This generally means that the public schools may not use their personnel, influence or resources to advance or inhibit religion. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

It is also important to keep in mind that the Constitution also forbids the public school from discriminating among religions, as well as promoting religion generally.[6] *Everson v. Board of Educ.*, 330 U.S. 1

---

[6]Although not directly addressed by any case decision, it would also appear to be unconstitutional for a school to promote atheism or agnosticism.

(1947) and *Board of Education v. Grumet*, __ U.S. __, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994).

The required "neutrality" can be particularly daunting in the context of the public schools where freedom of speech is so fundamental, and where our religious pluralism is so substantial. While application of law can sometimes be unpredictable, good decisions can be made with common sense, a basic understanding of the legal principles, and overarching sensitivity to the principle that our schools are *public*, serving children of all faiths.

A. Constitutionally Protected Religious Environment

Public school authority is not required to banish all religious expression from our public schools. "The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion." *Crockett v. Sorenforson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983). Indeed, in some instances, the constitutional freedoms of speech and religion require governmental respect for, and accommodation of, religious expression in the public schools.

Students, as well as school employees, do not forfeit their constitutional rights at the "school house gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Religious expression by individuals is not second class speech, or a step-sister to secular speech. "[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (invalidating

permit requirements for religious speech in a public place); *Saia v. New York*, 334 U.S. 558 (1948) (invalidating an ordinance prohibiting the use of amplifying devices to broadcast religious messages).

The following scenarios generally illustrate protected religious expression in the public schools:

1. students discussing religion or reading religious literature during lunch or other free time[7];
2. students who meet at school before or after class on their own to pray among themselves and without disruption to others or school operation;
3. students expressing their religious viewpoints in assigned work — such as poems, class compositions, music and drawings — which are germane to the assigned projects;
4. students expressing their viewpoints, religious or otherwise, on their person or dress without disruption or in violation of any uniformly applied dress code.

Expression which is disruptive or which materially interferes with the rights of others, or which is lewd or obscene, may be prohibited and fairly disciplined. *Bethel*

---

[7]Generally, also, the freedoms of expression and religion also protect teachers who privately discuss religious matters among themselves in their free time without disruption. While there is no absolute litmus test, public school teachers must be mindful that they are authority figures and agents of government. In such capacity, teachers may not use the machinery of the state to indoctrinate religion in a "captive audience." When acting for or on behalf of the public schools, teaching personnel are subject to the same principles of "neutrality" governing the governmental agency.

Sch. Dist. v. Fraser, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

School authority may also impose reasonable content-neutral "time, place and manner" rules which further their legitimate educational interests; for example, regulating student clubs' access to meeting rooms solely on a "first come-first served" basis or designating rooms or locations without regard to the content or views of the student groups. In such instances, the speaker's religious views or ideas (content) are not considered and school personnel are not motivated by hostility to the religious viewpoint. The decision or action is prompted instead by independent and legitimate secular reasons such as maintaining needed discipline or responsible management of facilities.

School personnel have broader authority to regulate expressive activity in class time or during other instructional periods. This reasonableness standard, while deferential to the work of the public schools, does not provide license to be arbitrary. Its meaning is illustrated in the following decision of the United State Supreme Court.

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Court examined the authority of the public schools over "school-sponsored" student speech; that is, speech which is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271. The Court upheld the right of public school authority to ensure that their instructional programs, which have not been opened up generally as a public forum for unrestricted communication, are reasonably restricted to their educational purposes:

> [W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 273.[8]

Hazelwood thus recognizes that public educators are entitled:

> [T]o assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play dissociate itself not only from speech that would substantially interfere with (its) work . . . or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or

---

[8]*Hazelwood* specifically concerned the right of school authorities to control the content of a high school newspaper produced as part of the journalism curriculum. The student newspaper in this case did not operate autonomously. Students received grades and academic credit and their articles were customarily reviewed by school administrators as part of the curriculum. The Court upheld censorship of student editorials discussing student pregnancies and referencing sexual activity considered inappropriate for younger students. The Court determined that the school principal's concern for student privacy and suitability of material was reasonable given the circumstances.

> profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices. . . .

Id. at 271-272 (citations and internal quotes omitted).

Hazelwood however should not be read as authority to impose viewpoint censorship. While administrators and teachers may discipline and grade appropriately student expression or conduct which does not conform to their academic requirements, students should not penalized solely because their religious viewpoints appear in their work if their work otherwise conforms to the assignment.

These freedoms of individual speech and religious expression are important concerns of the law. Circumstances may exist where such expression must be accommodated because no important governmental interests are at stake. Where such interests are at stake, such as to preserve order and discipline, school authority may take reasonable and appropriate action.

B. Establishment of Religion: "Real Threat or Mere Shadow"

Public school personnel must have a basic understanding of the constitutional prohibition against their establishing religion in the public schools — not only because it is a most cherished restraint, but also to avoid suppressing protected speech in mistaken fear of endorsing religion. Public school authority must have "the ability and willingness to distinguish between real threat and mere shadow." *Abingdon Sch. Dist. v. Schempp*, 83 S. Ct. 1560, 1616 (1963).

In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, __ U.S. __, 113 S. Ct. 2141, 124 L. Ed. 2d 352

(1993), for example, the United States Supreme Court found that a public school had violated the freedom of speech and religion in selectively excluding a community religious group from equal access to school facilities after hours. Public school fears about endorsing religion were simply not justified. A uniformly applied "equal access" policy after hours, the Court reasoned, did not realistically suggest school imprimatur of the viewpoint of any organization. And, the benefits to religion in allowing equal access to meeting space, without any special privileges, were incidental.

The Establishment Clause, like the Free Exercise Clause, has as its central purpose the protection of religious liberty and individual conscience. The United States Supreme Court has stated that the Establishment Clause accomplishes this purpose by erecting a mandatory "wall of separation between Church and State." *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947). While the metaphor of a wall has become commonly used, it can be deceiving. The wall is not so high or so "wooden" as to absolutely proscribe any governmental action which indirectly or incidentally benefits religion.

The United States Supreme Court has realistically acknowledged that " 'total separation is not possible in an absolute sense'. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility to any." *Lynch v. Donnelly*, 465 U.S. 668, 672-673 (1984).

Fortunately or unfortunately, there are no "bright lines" for determining whether governmental action has crossed the line and established religion. The United State Supreme Court itself has remarked that the

Establishment Clause erects a " 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " 465 U.S. at 679. While not confining itself to any particular test, the Court has however traditionally applied a three-part test (also known as the "Lemon test") in searching for impermissible establishment.[9] In brief, the "Lemon test" requires that governmental action:

- be animated by a secular purpose(s) or motive(s);
- have a primary effect which neither advances nor inhibits religion; and
- does not foster excessive entanglement with religion.

---

[9]Unless and until overruled, the "Lemon test" provides the required conceptual framework. The "Lemon test" has received substantial criticism from several quarters, including justices on the Court favoring a more predictable, less result-oriented test. Justice Antonio Scalia has described this traditional test in picturesque terms:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .

Writing for the majority, Justice White responded:

> While we are somewhat diverted by Justice Scalia's evening at the cinema ... we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., __ U.S. __, 113 S. Ct. 2141, 2148 n.7 and 2149, 124 L. Ed. 2d 352, 363 n.7 and 365 (1993).

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

In other words, government decisions motivated by purely religious goals will ordinarily be invalidated. And, even when governmental action is animated by secular interests, it will nonetheless fail if its primary effect advances or inhibits religion or infuses government excessively in religious affairs. The United States Supreme Court, for example, has invalidated statutes authorizing voluntary student Bible readings at the opening of each school day over the intercom system or directly in class by a classroom teacher. The primary effect of such practice impermissibly advanced religion in the public schools. The Court found it immaterial that dissenting students could leave or that religious readings responded to the needs of the majority. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause").[10]

The Court has likewise invalidated a state law providing for "a moment of silence" where the evidence established no purpose other than to introduce voluntary prayer into the public schools. *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). And, in *Stone v. Graham*, 449 U.S. 39, 41 (1980), the Court invalidated the government posting of the Ten Commandments in the public schools where

---

[10]A federal district court in Virginia enjoined the teaching of optional Bible classes "as a religious exercise" in the Bristol City public schools. It was immaterial that the program was optional and that students received no grade or academic credit. *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983). Manifestly, the giving of credits for religious instruction would be constitutionally suspect.

there was no showing that the posting was genuinely part of any secular instructional program or other non-religious purpose:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.

Stone, 449 U.S. at 42.

The requisite "neutrality" in matters of religion does not mean that the Bible or other religious material can not be studied for its artistic and literary worth, for example, when objectively presented as part of a secular program. The Court has recognized that public education may not be complete without a study of our religious heritage or balanced comparison of religions. *School Dist. v. Schempp*, 374 U.S. 203 (1963). In such circumstances, the governmental motive or design is not the advancement of religion, the primary effect is to further secular educational goals, and a balanced academic study of religion ordinarily does not entangle government in religious affairs.

The Court has also found no genuine establishment concerns in providing community religious groups "equal access" to meeting rooms after hours. *Lamb's Chapel,* __ U.S. __, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). And, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court found no establishment with a city's display of a creche in a downtown park. While a creche has manifest religious significance, the Court found that the display was designed to, and had the primary effect of, recognizing a holiday with deeply rooted secular and religious origins.

In contrast, and illustrating how the facts and specific context may control the outcome, the Court invalidated a creche display in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Despite the secular motives of government, the particular setting of a creche dominating a grand staircase in a county courthouse had the unavoidable and primary effect of enhancing religion. The Court noted its fundamental question in each case whether:

> "[T]he challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S. at 597.

Judicial concern for the appearances of governmentally established religion have been particularly acute in the public school context. The population served not only contains a "captive audience" by reason of state law, but a population susceptible to misapprehension in an environment geared to shaping values. *See, for example, School Dist. v. Ball*, 473 U.S. 373, 390 (1985). ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.")

Similarly, in *Lee v. Weisman*, __ U.S. __, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), the Court invalidated pervasive governmental participation in graduation prayer. The Court also communicated concern for coercive pressure brought to bear on those students who do not, for religious reasons or philosophical reasons, wish

to participate but must attend to obtain the benefits of their graduation exercise.

While *Lee* has produced substantial debate as to its meaning in other fact situations, *Lee* signals the risk of courts' finding government participation in prayer at school sponsored events. This risk is pronounced when, as a result of governmental action, school benefits and privileges are conditioned on actual or symbolic participation by objecting students in religious exercise. In such circumstances, the purported "voluntary" character of the activity is disingenuous:

> The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored belief. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.

Weisman, 112 S. Ct. at 2665, 120 L. Ed. 2d at 493.

In some cases, as with an "equal access" to meeting rooms policy, the circumstances may however suggest to the reasonable student that the public schools have not sought to sponsor religion:

> [T]here is a crucial difference between *government* speech [or action] endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Mergens, 496 U.S. at 250.

Because of the variety of factual contests and the many court decisions which appear to be unpredictably fact-intensive, a common sense sensitivity to the proper role of a *publicly* supported school operation, with great potential for influence and shaping values, should always be a foundational guidepost. School leadership, responsibly sensitive to the religions [*sic*] pluralism in the public schools, is critical to providing learning environment equal to all and hostile to none:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

School Dist. v. Schempp, 374 U.S. 203, 308 (1963) (requoted in *Lee*, 112 S. Ct. at 2661, 120 L. Ed. 2d at 488).

APPENDIX C

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

"...Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools.... For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."

President Clinton
May 30, 1998

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on *Religious Expression in Public Schools* in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (*Chandler v. James*) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in *Boerne v. Flores* declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual

contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example,

begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (http://www.ed.gov) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America — that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

s/ Richard W. Riley
Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school

premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the

history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of 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.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor

discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school

facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media -- including the public address system, the school newspaper, and the school bulletin board -- to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well

as when it allows students to meet before and after the school day.

Revised May 1998

List of organizations that can answer questions on religious expression in public schools

Religious Action Center of Reform Judaism
Name: Rabbi David Saperstein
Address: 2027 Massachusetts Ave., NW, Washington, DC 20036
Phone: (202) 387-2800
Fax: (202) 667-9070
Web site: http://www.rj.org/rac/

American Association of School Administrators
Name: Andrew Rotherham
Address: 1801 N. Moore St., Arlington, VA 22209
Phone: (703) 528-0700
Fax: (703) 528-2146
Web site: http://www.aasa.org

American Jewish Congress
Name: Marc Stern
Address: 15 East 84th Street, New York, NY 10028
Phone: (212) 360-1545
Fax: (212) 861-7056

National PTA
Name: Maribeth Oakes
Address: 1090 Vermont Ave., NW, Suite 1200, Washington, DC 20005
Phone: (202) 289-6790
Fax: (202) 289-6791
Web site: http://www.pta.org

Christian Legal Society
Name: Steven McFarland
Address: 4208 Evergreen Lane, #222, Annandale, VA 22003
Phone: (703) 642-1070
Fax: (703) 642-1075
Web site: http://www.clsnet.com

National Association of Evangelicals
Name: Forest Montgomery
Address: 1023 15th Street, NW #500, Washington, DC 20005
Phone: (202) 789-1011
Fax: (202) 842-0392
Web site: http://www.nae.net

National School Boards Association
Name: Laurie Westley
Address: 1680 Duke Street, Alexandria, VA 22314
Phone: (703) 838-6703
Fax: (703) 548-5613
Web site: http://www.nsba.org

Freedom Forum
Name: Charles Haynes
Address: 1101 Wilson Blvd, Arlington, VA 22209
Phone: (703) 528-0800
Fax: (703) 284-2879
Web site: http://www.freedomforum.org