Religion in the Public Schools: A Road Map for Avoiding Lawsuits and Respecting Parents' Legal Rights
©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

Chapter Six: School Activities and Accommodations

A. School Calendar and Scheduling School Activities

1. Public Schools May Close on Religious Holidays If They Do So for Valid Secular Reasons

The Supreme Court has determined that states and public schools can make scheduling choices to close on religious holidays, if they do so for valid secular reasons. This means that schools may close on Christmas or Good Friday to prevent excessive absenteeism, to give a winter or spring break, or to cut down on expenses (i.e., staying open during the coldest part of the year tends to raise heating costs). This same rule would apply to closing school on Yom Kippur or Rosh Hashana: If the school district is located where a large number of students are Jewish, closing those schools during the High Holidays can be a secular matter of efficiency because so many students and teachers would otherwise miss school on those days, making it impracticable to hold school.

Along these lines, lower federal courts have held that giving days off to state employees or closing schools on religious holidays has the secular purpose of preventing absenteeism,[1] and in the case of Good Friday, providing public employees with a long spring weekend.[2] Additionally, two other federal courts[3] have concluded that schools may close on Good Friday and traditional Jewish holidays such as Yom Kippur and Rosh Hashanah because "high absenteeism among both teachers and students on those days resulted in low instructional productivity and increased costs [in terms of] substitute teachers."[4]

2. Schools Must Permit Students to Make Up Work and Tests Missed Due to Observing Religious Holidays, Unless Students Are Missing Several Weeks of School Per Semester

Public school districts would likely have to permit students to make up work or tests missed because of the observance of religious holidays. For example

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

in *Church of God (Worldwide, Texas Region) v. Amarillo Independent School District*,[5] the court concluded that a school rule that counted all absences beyond two days for religious reasons as unexcused absences and prohibited students from receiving credit for class work or tests performed during these days, violated the free exercise rights of students who, as members of the Church of God, had missed approximately eight to ten days of school each year "while observing the annual holy days and seven-day convocation."[6]

But even if a student has sincere religious beliefs, the school need not accommodate those beliefs if the student has other reasonable alternatives that would permit the student to meet religious obligations without requiring the school to accommodate the student. For example, in *Keller ex rel. Keller v. Gardner Community Consolidated Grade School District 72C*,[7] the court rejected the student's claim that the school district violated his free exercise rights by enforcing a religion-neutral school rule that required basketball players who wanted to play in the next scheduled game to attend practice, except in the case of illness or death in the family—a rule that interfered with his catechism schedule.[8] The court found that the student's request was more of a personal than religious nature because there were nearby catechism classes that the student could attend, while still meeting his religious needs, and which would not require him to miss basketball practice. The court added that, even if attending these practices were a burden on his religious beliefs, the school's interest in administering a regularly scheduled practice, particularly because of the potential administrative burdens that could accompany accommodating many students' religious beliefs, outweighed the student's religious burden.[9] Unless students are missing excessive amounts of school, such as the students in *Commonwealth v. Bey*,[10] whose parents sought to keep them home from school every Friday, a school should permit students to make up work and tests that students miss for religious reasons.

3. Public Schools May Schedule Sports Activities to Avoid Sundays or Holy Days

Public schools may schedule sports and other extra-curricular activities to avoid Sundays or holy days where such policies have a secular purpose that accommodates religions and have only an incidental, rather than a primary, effect of advancing religion.[11] For example, in areas where there is a large

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

Jewish student or teacher population, public schools can make the pragmatic choice to avoid scheduling sports activities or other events on Jewish holidays for the secular purpose of having to avoid rescheduling the event because of excessive absenteeism. These decisions are consistent with Supreme Court decisional law instructing that laws which protect or accommodate religious freedom without imposing religious worship on others are simply religious accommodations and do not violate the Establishment Clause.[12]

Although public schools may schedule extracurricular activities to avoid conflicts with religious obligations, public schools do not violate a student's federal free exercise rights by scheduling extracurricular or sports activities on the same day as a student's Sabbath.[13] By contrast, some states may require more accommodation of religious practices or prohibit any type of religious discrimination without the showing of an undue hardship.[14] Accordingly, school administrators should consult state regulations, statutes, and constitutions to ascertain whether more accommodation is required in a particular state.

4. Other Holiday Issues: Ways in Which Public Schools "Celebrate" Holidays Such As Christmas and Halloween

The exact contours of what does or does not violate the Establishment Clause are sometimes difficult to define. Nevertheless, the Supreme Court has suggested that it is permissible for public schools to teach about religion or the differences in religious sects,[15] as long as the school does not favor religion over nonreligion or one religion over the other.[16]

Following the Supreme Court's guideposts, one lower federal court has concluded that public schools can prohibit the performance of religiously themed music at school assemblies and after school performances, including winter recitals and concerts, without violating the Establishment Clause when the school's intent is to show neutrality towards various religions.[17] But schools can also remain neutral and address cultural diversity during the holiday seasons by displaying holiday symbols, such as menorahs and the star and crescent, as long as these symbols are displayed with other holiday decorations reflecting different beliefs or customs.[18] Nor does it violate the Establishment Clause for a public school to display secular symbols that also have religious meaning, such as menorahs or the star and crescent, while not

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

displaying a crèche and instead displaying more secular Christmas symbols such as Christmas trees and wreaths.[19] This is so because the Supreme Court has determined that the menorah is a symbol with both secular and religious meaning, while the nativity scene, standing by itself without other secular symbols such as Santa Claus, is just a religious symbol.[20]

At least one lower federal court, however, has determined that as long as the crèche is presented along with many other secular elements of the winter holiday season, such as toy soldiers, ballerinas, reindeer, and Santa Claus, then the crèche is permissible.[21] But, it would be prudent for a school district to stick to more secular Christmas symbols, as the contours of the Establishment Clause with respect to crèche displays are ill-defined.[22] Further, while the crèche display in *Lynch v. Donnelly* was upheld against an Establishment Clause challenge because it was part of a larger holiday display in a public park,[23] it must be emphasized that this display was upheld as a public display, rather than a display in the public schools. This is important because the Supreme Court has repeatedly noted that Establishment Clause analysis can yield different results depending upon whether the challenged conduct occurs in the public school or in some other public setting.[24] It would therefore be wise to use symbols which the Supreme Court has determined to have religious and secular meaning, rather than just religious meaning, and to incorporate these symbols into a display that celebrates cultural and religious diversity.[25]

When celebrating Halloween, it does not violate the Establishment Clause for teachers and students to dress as witches and for teachers to decorate their classroom walls with witches and brooms, even though some may associate witches and witchcraft with the Wicca religion, as long as there are no wiccan religious ceremonies involved in the Halloween holiday celebration.[26]

B. Other Accommodations

1. Schools May Provide Kosher Meals in the Cafeteria to Accommodate the Religious Dietary Practices of Jewish Students but Are Not Required to Provide Special Spaces for Such Meals

As a matter of federal free exercise law, just as public schools are not required to create special spaces for Muslim prayer, public schools are not required to

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

provide special spaces in their cafeterias for kosher meals or build foot baths in their restrooms. Applying *Smith*, courts are likely to treat any burdens created where the schools lack such amenities as incidental burdens that would therefore raise no serious First Amendment problems.

2. Public Schools Could Probably Eliminate the Words "Under God" from the Pledge of Allegiance to Meet the Demands of Non-Theistic Parents

In 1942, Congress enacted the Pledge of Allegiance,[27] "as part of an effort 'to codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America.'"[28] In 1954, Congress amended the Pledge of Allegiance by adding the words "under God" between the words "one Nation" and "indivisible." [29] The legislative history of that amendment is expressly religious: "The House Report that accompanied that legislation observed that, '[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.'"[30] States have institutionalized the recitation of the Pledge of Allegiance by requiring, for example, public elementary schools to "conduct[] appropriate patriotic exercises" at the beginning of the school day and by adopting a rule that reciting the Pledge of Allegiance satisfies this requirement.[31]

The First Amendment prohibits public schools from either compelling students to recite the Pledge of Allegiance or disciplining students for failing to salute the flag or recite the Pledge.[32] Nor may public schools discipline students for sitting and remaining silent during the Pledge of Allegiance.[33] Nor may public schools require students to stand at attention during the Pledge of Allegiance.[34] But public schools may require through state statute or school policy that the school day begin with recitation of the Pledge as long as pupils are free not to participate.[35]

Whether the 1954 Act that codifies the current version of the Pledge of Allegiance to include the words "under God" and whether the policy of many public schools to engage in teacher-led recitation of the Pledge are unconstitutional are much more difficult questions to answer. Were attorneys for public schools or complaining students drafting litigation briefs on a blank slate then a simple application of the *Lemon* test suggests that the 1954 Act is unconstitutional. After all, the express purpose of the 1954 Act

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

is religious and therefore would likely fail the *Lemon* test. Moreover, the teacher-led recitation of the Pledge would likely fail the endorsement test. As the Ninth Circuit once pointed out in *Newdow v. U.S. Congress* (*Newdow I*), "the statement that the United States is a nation 'under God' is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism"—although that court has since concluded that the Pledge of Allegiance is unconstitutional on other grounds, electing not to reach the endorsement issue.[36] The Pledge of Allegiance could also fail the coercion test articulated in *Lee v. Weisman*.[37]

But there are some practical problems with following the Ninth Circuit's decision in *Newdow*. First, the Supreme Court held that the student's father lacked prudential standing.[38] Therefore, there are serious concerns about the legal validity of that opinion. In particular, in light of the Supreme Court's decision, the Ninth Circuit's decision probably has no precedential value, even though one district court concluded that the Ninth Circuit's decision was binding on it.[39] Second, no other court in the country has held that the Pledge is unconstitutional. One judge's or one court's decision has limited authority to bind other courts, except when the decision is that of the U.S. Supreme Court.

Beyond that, it is difficult to predict what the current Supreme Court is likely to do were the question to come before it in the near future. It is possible that the Court would find the Pledge unconstitutional. It is also possible that the Court would disagree with the Ninth Circuit's analysis, holding that the Pledge of Allegiance is more akin to other practices such as our national motto—"In God We Trust"—are is therefore not unconstitutional.[40] After all, the Court has already opined in nonbinding dicta that the Pledge and our national motto are "consistent with the proposition that government may not communicate an endorsement of religion."[41] So while the Pledge of Allegiance does not seem to be in any immediate jeopardy, there are already lawsuits challenging its constitutionality and therefore the question is likely to eventually come up again before the Court.

In the meantime, the question whether a public school could accommodate an atheist student by eliminating the words "under God" from the Pledge remains open. Using the logic of one district court case, which concluded that public schools can prohibit the performance of religiously themed music at school assemblies and after-school performances,[42] coupled

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

with Supreme Court decisional law such as *Barnette* and the fact that federal and state law are typically satisfied not solely by reciting the Pledge of Allegiance but by engaging students in any patriotic act to commence the day, a public school should be able eliminate the words "under God," from the Pledge as an accommodation of the wishes of non-theistic parents. Nevertheless, it remains likely that, under *Tinker*, the school district could not punish or reprimand a student who did say the words "under God," while reciting the Pledge. This is so because *Tinker* permits student speech and student expression as long as it does not cause a substantial disruption or material interference with the classroom environment.[43] Moreover, disapproving of a student mentioning these words would likely evidence hostility toward religion.

C. Artistic and Literary Religious Works

1. Public Schools Generally May Not Accept Gifts or Display Religious Paintings or Icons Except, Possibly, As Part of a Secular Curriculum Focusing on Their Historical or Artistic Value

Public schools generally may not accept gifts or display religious artwork without historical value. Because of the age and impressionability of public school students (who are not only a captive audience in the public schools but also a group that is more readily coerced than adults), courts have generally restricted such gifts and displays as potential endorsement of religion more strictly than with adult audiences.[44]

But public schools might run afoul of the Constitution even by displaying artwork with significant historical value, depending on the context. For example, it would be unconstitutional for a public school to display a reproduction of Warner Sallman's *Head of Christ* or Leonardo da Vinci's *The Last Supper* in the reception area of a public school.

Along these lines, the Supreme Court has held that states may not require the posting of the Ten Commandments on the walls of public school classrooms.[45] This is so even when the state statute requires that private contributions be used to purchase copies of the Ten Commandments and that below the last commandment is a notation concerning the purpose of the display stating that the posting has a secular purpose.[46] Lower federal courts

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

have interpreted decisions such as these as prohibiting public schools from hanging portraits of Jesus or other religious figures on the school's walls.[47] A school's assertion that the picture is displayed as "an artistic work or that it is a depiction of a historical figure" will not prevent the courts from finding an Establishment Clause violation.[48] This is so even when the picture has been bolted to the school walls for over thirty years.[49] Nor can schools display religiously themed artwork, such as a picture of Jesus that a current student donated to the school.[50]

To be sure, the Supreme Court did hold in *Van Orden v. Perry*[51] that a Ten Commandments monument presented by the Fraternal Order of the Eagles and located for over forty years outside the Texas State Capital among dozens of other monuments and historical markers did not violate the Establishment Clause because the display—although undoubtedly religious—was typical of unbroken history, dating back to 1789, of official acknowledgments by all three branches of government of religion's role in American life, and had undeniable historical meaning.[52] But it is unlikely that the Court would draw the same conclusion in the public-school context. This is so because the Court has expressly acknowledged in numerous cases that school children are a captive audience and coercible.[53] Accordingly, at least one lower federal court has reasoned that "any action of the state which, either directly or indirectly, conveys that religion, or a particular type or religion, is more accepted, respected, or tolerated than another value system has the potential to subtly coerce students to acquiesce to the promoted religion."[54]

2. Public School Libraries May Contain Holy Scriptures So Long As Their Inclusion Does Not Show Preference for One Particular Sect or Religious Works in General

The Supreme Court has acknowledged that "the Bible is worthy of study for its literary and historic qualities," and that studying the Bible or religion "when presented objectively as a part of a secular program of education" may be consistent with the First Amendment.[55] The Supreme Court has further stated that the public school library is a place where "students must always remain free to inquire, to study and to evaluate, to gain maturity and understanding."[56]

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

Following the Supreme Court's guidance, one lower federal court has determined that "[p]ublic school libraries may include Bibles and other religiously oriented books provided that no one sect is favored in the library and their inclusion in the library's collection does not show any preference for religious works in general."[57] This same court concluded that removing the Bible from the school's library violated the First Amendment under the rationale of *Board of Education, Island Trees Union Free School District No. 26 v. Pico* because the school was removing books from the library due to school administrators' objections to its content.[58] But, this same court determined that a school had a legitimate pedagogical purpose in removing picture Bibles from a fifth grade teacher's classroom library, because fifth grade students could perceive the inclusion of the Bibles as an endorsement of Christianity.[59] Finally, although a public school library may include Bibles and other religious books on its shelves, it may not purchase those books for religious reasons—"no one sect [may be] favored in the library and their inclusion in the library's collection [may] not show any preference for religious works in general."[60]

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

End Notes

End Notes: Chapter Six

1 *Compare* Cammack v. Waihee, 932 F.2d 765, 782 & n.19 (9th Cir. 1991) (Hawaii statute establishing Good Friday as state holiday did not violate Establishment Clause where evidence established that Hawaii's recognition of that holiday was "sufficiently focused toward its secular purpose"); *and* Koenick v. Felton, 190 F.3d 259, 265-69 (4th Cir. 1999) (Maryland statute establishing Good Friday and Easter Monday as school holidays to avoid excessive absenteeism did not violate Establishment Clause); *with* Metzl v. Leininger, 57 F.3d 618, 621-22 (7th Cir. 1995) (Illinois statute establishing Good Friday as a school holiday violated the Establishment Clause because it promoted Christianity over other religions and the state failed to articulate a valid secular purpose).

2 Bridenbaugh v. O'Bannon, 185 F.3d 796, 798 (7th Cir. 1999) (determining that, under the *Lemon* test, an Indiana statute providing that state employees would receive Good Friday off did not violate the Establishment Clause because "while the Good Friday holiday has 'the potential effect of making it easier for religious Christian state employees to practice their religion,' Indiana had established a valid secular justification for the Good Friday holiday—to provide a long spring weekend for its employees.").

3 Koenick v. Felton, 190 F.3d 259, 262, 265-69 (4th Cir. 1999) (giving religious holidays, such as Good Friday, Yom Kippur, and Rosh Hashanah, off from school to avoid excessive absenteeism did not violate Establishment Clause); Granzeier v. Middleton, 173 F.3d 568, 576 (6th Cir. 1999) (concluding that "so long as the finding can be made that there is a significant secular reason for closing on any particular date, . . .the fact that the closing is also convenient for persons of a particular faith does not render the closing unconstitutional").

4 *Koenick*, 190 F.3d at 262.

5 Church of God v. Amarillo Indep. Sch. Dist., 511 F. Supp. 613 (N.D. Tex. 1981), *aff'd without opinion by* 670 F.2d 46 (5th Cir. 1982) (per curiam).

6 *Church of God*, 511 F. Supp. at 614.

7 Keller *ex. rel* Keller v. Gardner Cmty. Consol. Grade Sch. Dist. 72C, 552 F. Supp. 512 (N.D. Ill. 1982).

8 *Id.* at 513.

9 *Id.* at 514-16.

10 *See, e.g.*, Commonwealth v. Bey, 166 Pa. Super. 136, 138 n.3, 141-42, 70 A.2d 693, 694 n.3, 995-96 (1950) (noting that parochial and private schools and private daily tutoring, may satisfy the compulsory attendance law and holding that "[s]ince the parent may avail himself of other schools, including parochial or denominational schools, the statute does not interfere with or impinge upon" the free exercise rights of Mohammedan parents who wished to keep their children home on Fridays for religious purposes).

11 Student Members of Playcrafters v. Bd. of Educ. of the Twp. of Teaneck, 177 N.J. Super. 66, 77-78, 424 A.2d 1192, 1198-99 (N.J. Super. Ct. App. Div. 1981), *affirmed* 88 N.J. 74, 438 A.2d 543 (1981) (per curiam) (school board policy prohibiting extracur-

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

ricular activities on Friday evenings, Saturday days, and Sunday mornings did not violate the Establishment Clause of either the Federal or New Jersey state Constitution on its face or as applied to bar school play on Friday evening).

12 *See, e.g.*, Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617, 622-24, 627-28 (1961) (plurality) (rejecting Establishment, Free Exercise, and Equal Protection challenges to Sunday closing law).

13 Smith v. Bd. of Educ., 844 F.2d 90 (2d Cir. 1988) (school did not violate Orthodox Jewish student's free exercise rights when it scheduled graduation on that student's Sabbath so long as attendance at graduation is not a pre-requisite to the student's receipt of a high school diploma).

14 *See, e.g.*, Or. Rev. Stat. § 659.850(1) (2009), which prohibits discrimination on the basis of age, disability, national origin, race, marital status, religion, or sex. *See also* Montgomery v. Bd. of Educ., 188 Or. App. 63, 71 P.3d 94 (Or. Ct. App. 2003) (finding that the Oregon School Activities Association ("OSAA") was required to attempt to find a reasonable accommodation for religious practices of students who were Seventh Day Adventists and were prohibited from participating in games held on their Sabbath that ran from sundown Friday to sundown Saturday); Nakashima v. Bd. of Educ., 206 Or. App. 568, 183 P.3d 854 (Or. Ct. App. 2006) (concluding that Oregon State Athletic Commission had failed to establish that proposed accommodation was unreasonable and imposed undue hardship and that statutory requirement of more than a *de minimis* "hardship" did not violate the Establishment Clause).

15 Sch. Dist.v. Schempp, 374 U.S. 203, 225 (1963) ("In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible, or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."); *id.* at 300 (Brennan, J., concurring) ("The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the difference between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion."); *id.* at 306 (Goldberg, J., concurring) ("Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me . . . that the Court would recognize the propriety of . . . teaching about religion, as distinguished from the teaching of religion, in the public schools.").

16 Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or the advocacy of nonreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

17 Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist., 577 F. Supp. 2d 731 (D. N.J. 2008). Applying *Lemon*, the court concluded that the public school's policy had the primary secular purpose of preventing an overt endorsement of religion or an improper focus on religious holidays. *Id.* at 744. Next, the court determined that the primary effect of the policy was to promote complete religious neutrality, which neither favored one religion over the other nor demonstrated hostility toward any religion. *Id.* at 745-46. Finally, the court reasoned that the school was seeking to

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

avoid entanglement "in disputes and disagreements over the celebration of religious holidays, by maintaining a policy of complete religious neutrality when it comes to school sponsored assemblies and activities." *Id.* at 748.

18 Skoros v. City of New York, 437 F.3d 1, 11 (2d Cir. 2006) (citing County of Allegheny v. ACLU, 492 U.S. 573 (1989)).

19 *Id.* (citing County of Allegheny v. ACLU, 492 U.S. 573 (1989)).

20 *County of Allegheny*, 492 U.S. at 598-602, 613-21.

21 Doe *ex rel.* Doe v. Wilson County Sch. Sys., 564 F. Supp. 2d 766, 800 (M.D. Tenn. 2008) (comparing and contrasting the crèche displays in County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989) and Lynch v. Donnelly, 465 U.S. 668, 685-86 (1984)).

22 *See, e.g.*, ACLU v. Schundler, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) (observing that the Supreme Court's religious display decisions "have been marked by fine line-drawing," so that "it is not easy" for public officials "to determine whether particular displays satisfy the Court's standards.").

23 Lynch v. Donnelly, 465 U.S. 668 (1984).

24 *Compare* Stone v. Graham, 449 U.S. 39, 42-43 (holding unconstitutional state law requiring Ten Commandments to be posted in every public classroom) *with* Van Orden v. Perry, 545 U.S. 677 (2005) (rejecting Establishment Clause challenge to Ten Commandments display on state capitol grounds); *compare also* Lee v. Weisman, 505 U.S. 577, 598-99 (holding prayer at secondary school graduation to be unconstitutional); *with* Marsh v. Chambers, 463 U.S. 783, 793-95 (1983) (upholding prayer in Nebraska state legislature). *See also County of Allegheny*, 492 U.S. at 620 n. 69 (Blackmun, J.) (noting that combined Christmas tree and menorah display "might raise additional constitutional considerations" if display were "located in a public school.").

25 Clever v. Cherry Hill Twp. Bd. of Educ., 838 F. Supp. 929 (D. N.J. 1993) (approving displays that include celebrations or symbols of at least two distinct religions or cultures during the winter holiday season); *Accord* Sechler v. State College Area Sch. Dist., 121 F. Supp. 2d 439 (3d Cir. 2000); Skoros v. City of New York, 437 F.3d 1 (2d Cir. 2006); Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311 (8th Cir. 1980).

26 Guyer v. Sch. Bd. of Alachua County, 634 So. 2d 806 (Fla. Dist. Ct. App. 1994)

27 Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

28 Newdow v. Cong. of U.S. 383 F. Supp. 2d 1229, 1232 (E.D. Cal. 2005) (citing 56 Stat. 380) (1942)).

29 The Pledge of Allegiance is currently codified as follows:

> The Pledge of Allegiance to the Flag: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

4 U.S.C. § 4 (2009).

30 Newdow v. Cong. of U.S., 383 F. Supp. 2d 1229, 1232 (E.D. Cal. 2005) (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 2 (1954)).

31 *See, e.g.*, Cal. Educ. Code § 52720 *cited in Newdow*, 383 F. Supp. 2d at 1233.

32 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

33 Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973).
34 Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978).
35 Sherman v. Cmty. Consol. Sch. Dist. No. 21, 980 F.2d 437 (7th Cir. 1992).
36 Newdow v. U.S. Congress, 292 F.3d 597, 607 (9th Cir. 2002) (*Newdow I*). *But see* Newdow v. U.S. Congress, 328 F.3d 466, 487 (9th Cir. 2003) (*Newdow III*) (amending *Newdow I* so as not to reach the endorsement issue and denying rehearing en banc).
37 505 U.S. 577, 592 (1992) (explaining that formalized school prayer carries "a particular risk of indirect coercion"); *see also* Chapter 2.
38 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11-18 (2004).
39 Newdow v. Congress of the United States of America, 383 F. Supp. 2d 1229, 1241-42 (E.D. Cal. 2005) (expressly relying on Newdow v. U.S. Congress, 328 F.3d 466, 488, 490 (9th Cir. 2003) as mandatory authority).
40 County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989).
41 *Id.* (citing Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *id.* at 716-17 (Brennan, J., dissenting)).
42 Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist., 577 F. Supp. 2d 731 (D. N.J. 2008).
43 *See generally* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 512-13 (1969); *see also* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992) (determining that the school district has the burden of proving a reasonable forecast that the student speech would substantially disrupt or materially interfere with school activities).
44 Washegesic v. Bloomingdale Pub. Schs., 813 F. Supp. 559, 561 (W.D. Mich. 1993) (citing Edwards v. Augillard, 482 U.S. 578, 583-84 (1987) and noting that "[T]he Supreme Court 'has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,'" and that "'families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.'"), *aff'd*, 33 F.3d 679 (6th Cir. 1994).
45 Stone v. Graham, 449 U.S. 39 (1981) (per curiam).
46 *Id.* at 40 (the Kentucky statute, 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980) required that the notation state "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental code of Western Civilization and the Common Law of the United States.").
47 Washgesic v. Bloomington Pub. Schs., 813 F. Supp. 559, 563-64 (W.D. Mich. 1993) , *aff'd*, 33 F.3d 679 (6th Cir. 1994).
48 *Id.* at 563.
49 *Id.* ("This Court's analysis does not depend upon the length of time the picture has hung on the school wall. The Court cannot countenance a constitutional violation simply because it is longstanding.").
50 Joki v. Bd. of Educ., 745 F. Supp. 823, 824-25 (N.D. N.Y. 1990) (painting of Jesus that a current art student donated to the high school and that was displayed in the auditorium as part of the school's program to permit students who were planning careers in art to display original artworks in the auditorium without interference from school supervision had the primary effect of "placing the imprimatur of state authority upon" a religious message under the *Lemon* test and therefore violated the Establishment Clause, in context where student painting of Jesus was one of only three paintings—only two of which were student paintings—and where the Jesus painting was much larger and hung on its own wall).

©2009 Anne Marie Lofaso This book was downloaded free of charge at religioninthepublicschools.com

51 Van Orden v. Perry, 545 U.S. 677 (2005)
52 *Id.*
53 *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 684-89 (1971) (distinguishing the case from *Lemon v. Kurtzman* because "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education" and college students "are less impressionable and less susceptible to religious indoctrination."); Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination or peer pressure.").
54 Washegesic v. Bloomingdale Pub. Schs., 813 F. Supp. 559, 564 (W.D. Mich. 1993) (citing *Lee v. Weisman*).
55 Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963).
56 Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1981) (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)).
57 Roberts v. Madigan, 702 F. Supp. 1505, 1513 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990); *see also* Evans v. Selma Union H.S. Dist., 193 Cal. 54, 222 P. 801 (1924).
58 *Pico*, 457 U.S. 853.
59 Roberts v. Madigan, 702 F. Supp. 1505, 1512-14 (D. Colo., 1989), *aff'd*, 921 F.2d 1047, 1057-58 (10th Cir. 1990).
60 *Roberts*, 702 F. Supp. at 1513, *aff'd*, 921 F.2d 1047, 1057-58 (10th Cir. 1990).