

PREFACE

Controversies involving religion in public schools seem to occur with great frequency and involve a broad range of topics. These wide-ranging controversies are heavily regulated by the law, thereby leaving public school teachers and principals, school board directors, and other school officials vulnerable to legal liability. Many well-meaning educators often find themselves caught in what feels like no-win situations, with parents threatening to sue if the school acts in one way and other parents threatening to sue if the school acts in a contrary way. The situation is complicated by the fact that religious issues in public schools are governed by many sources of law including federal and state constitutional law, federal statutory law, state and local laws, and other education policies, including school board policies.

This six-chapter book provides a road map for navigating these complicated legal waters to avoid lawsuits and for respecting the legal rights of parents, who are often the plaintiffs (on behalf of their children) in these lawsuits.

Chapter One: Overview of the First Amendment Framework in the Public School Context. This chapter provides an overview of the pertinent constitutional clauses that govern the most common disputes involving religion in public schools. In particular, this chapter introduces the lay person to the Establishment, Free Exercise, and Free Speech Clauses of the United States Constitution's First Amendment. Public schools must conduct themselves within the confines of these clauses, as interpreted by the federal courts.

The Establishment Clause prohibits public schools and their officials from acting in ways inconsistent with the now-famous, three-part *Lemon* test, named after the Supreme Court case that first articulated that standard. Under the *Lemon* test, the actions of educators (1) must have a primary secular purpose; (2) must have primary effects that neither advance nor inhibit religion; and (3) must not result in excessive entanglement with religion. These are known as the purpose, effect, and entanglement prongs of the *Lemon* test. Subsequent courts have also sometimes discussed the *Lemon* test in terms of endorsement.

Although public schools may not “establish” religion by acting with religious purpose or effect, by entangling themselves with religion, or by endorsing religion, they also may not prohibit the free exercise of any particular student’s religious beliefs or expression. The trick for many schools is how to permit religious liberty without endorsing religion. Once again, the courts provide guidance for conduct: Educators may not target religious practices in promulgating regulations. But educators may freely promulgate and enforce religion-neutral regulations, even if those regulations have an incidental effect on religion. Educators must also tolerate religious expression unless that expression substantially disrupts classwork, is offensively lewd and indecent, or endorses illegal drug use. Notwithstanding the broad protection student religious expression receives, public schools remain free to regulate school-endorsed student expression.

These principles lay the constitutional framework for understanding the other questions posed in this book. These questions include: school prayer; access to school facilities; curriculum choices; student religious expression; and school activities.

Chapter Two: School Prayer. It is well-settled that institutionalized school prayer is unconstitutional. That means that educators may not ask students to recite prayers; commence the school day with a Bible reading; set aside moments for silent prayer or meditation to foster prayer; or sponsor prayer during public school functions. But student-led, student-initiated prayer may be constitutionally permissible so long as it is not done over the school’s public address system and does not involve faculty, coach, or staff participation. The chapter ends with a short discussion of the extent to which public schools must accommodate religious prayer practices that require school space or time.

Chapter Three: Equal Access. The Equal Access Act (EAA) is a federal law that generally requires a public school to allow student religious clubs to use school facilities on the same terms that the school provides those facilities to other “non-curricular student clubs.” Public schools trigger the EAA’s requirements when they open their facilities to one or more non-curriculum-related student group. In those cases, a public school is said to have created a “limited open forum” and may not discriminate against other noncurriculum-related groups, such as the Bible Club, by denying them access to school facilities. In other words, once the EAA is triggered, schools

must grant religious groups the same access to school facilities as they would to nonreligious groups. Notwithstanding the broad protections afforded students under the EAA, schools retain authority to decide curriculum, to maintain order and discipline, and to protect the well-being of the school community.

A public school's obligations under the EAA should not be confused with its obligations under the Constitution to give access to outside religious groups once it has opened its doors to nonreligious outside groups. In such cases, the public school is said to have created a limited *public* forum (as opposed to a limited *open* forum), and the EAA (which governs only the treatment of student groups) does not apply. Instead, free speech principles under the Constitution apply, which means that the public school may not engage in content or viewpoint discrimination. Hosting school assemblies does not create either a public forum or an open forum, and therefore public schools remain in control of assembly content.

Chapter Four: Curriculum Issues. This chapter is divided into two subparts: (A) Constitutional Limitations that Affect Public School Curriculum and Opt Outs and (B) Teaching Evolution and Its Alternatives.

A. Constitutional Limitations That Affect Public School Curriculum and Opt-Outs. This section establishes the basic principle that public schools may not use religious criteria for selecting or removing books from the school library collection. It proceeds to discuss the extent to which opt-outs are constitutionally permissible. For example, public schools may, but are not required to, allow students to opt out of class material that is inconsistent with their religious beliefs. Students may not, however, opt out of large segments of the school's curriculum. Public schools may continue to regulate school work by prohibiting students from submitting work that does not comply with the exercise's pedagogical purpose.

B. Teaching Evolution and Its Alternatives. This section deals with the evolution controversy, and sets forth the following well-settled legal principles: public schools may not outlaw teaching evolution; public schools may not give equal time for discussion of evolution and creation science; and public schools may not teach creationism alongside evolution as part of the high school science curriculum. Courts more recently have concluded that public schools may not teach intelligent design as an alternative to evolution as part of the high school science curriculum; nor may teachers claim

an academic freedom right to teach intelligent design in those classes. The section ends with a discussion of how it might be permissible to teach about creationism or intelligent design in public schools—in particular, as part of a literature, philosophy, or world religion course.

Chapter Five: Student Religious Expression. This chapter discusses the extent to which schools not only must safeguard but also may regulate student religious expression. The same constitutional principles that protect student speech also protect the subcategory of student religious expression. All student speech—religious or nonreligious—falls into one of four boxes, each known by the name of the Supreme Court case that established the speech category: *Tinker*, *Hazelwood*, *Fraser*, and *Morse*. Under *Tinker*, educators generally must tolerate student personal expression but may regulate student speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” Notwithstanding the broad protections set forth under *Tinker*, educators are generally free to regulate school-endorsed speech (*Hazelwood*); “offensively lewd and indecent speech” (*Fraser*); or speech that endorses illegal drug use (*Morse*). Applying these principles, educators may regulate student newspapers and establish dress and grooming codes.

Chapter Six: School Activities and Accommodations. This chapter is divided into three subparts: (A) School Calendar and Scheduling School Activities; (B) Other Accommodations; and (C) Artistic and Literary Religious Works.

A. School Calendar and Scheduling School Activities. This section focuses on the extent to which public schools may schedule activities around religious holidays. In general, schools may make such accommodations for secular reasons, such as to avoid scheduling problems that would arise where the school schedules an event on a day that many of its students or faculty and staff would be absent. Public schools must also allow a student to make up work missed because of religious observance unless the student is missing several weeks of school.

B. Other Accommodations. This short section discusses the following two issues. First, although schools may provide special meals in the school cafeteria to accommodate students' religious dietary practices, schools are not required to build spaces to accommodate such practices. The se-

cond section discusses legal issues surrounding recitation of the Pledge of Allegiance.

C. Artistic and Literary Religious Works. The final section discusses principles involving artistic and literary religious works. Public schools generally may not accept gifts or display religious paintings or icons often even if those artistic works have historical value. But public school libraries may contain Holy Scriptures, such as the Bible, so long as those scriptures were not purchased for religious reasons.

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A final word of caution—This book is not an attempt to give legal advice and should not be viewed as a substitute for seeking the legal advice of counsel in any particular context. Rather this book attempts to educate school officials, who may need a resource for understanding the constitutional and, in some cases, statutory framework that shapes the legal behavior of educators in cases involving religion in public schools. As such, it is my hope that this book provides a road map for avoiding lawsuits and respecting parents' legal rights.

ACKNOWLEDGMENTS

The preparation of *Religion in the Public Schools: A Road Map for Avoiding Lawsuits and Respecting Parents' Legal Rights* was supported by funds from the Richard and Rhoda Goldman Fund. The author wishes to express her gratitude to the Goldman Fund for its financial support.

The author wishes to thank Professors Robert M. Bastress and John E. Taylor for engaging in extensive conversations about several sections covered by this book. Although Professors Bastress and Taylor provided constructive comments and suggestions, they did not review a final draft of this book before its publication. All errors, therefore, are the author's.

The author also wishes to thank the following members of the West Virginia University College of Law Faculty for encouraging me while writing this book and for creating a work environment supportive of this project: Joyce E. McConnell, William J. Maier, Jr. Dean & Thomas R. Goodwin Professor of Law; John W. Fisher II, William J. Maier, Jr. Dean Emeritus & Professor of Law; Gerald G. Ashdown, James H. Buck & June M. Harless Professor of Law; Robert M. Bastress, John W. Fisher II Professor of Law; andré douglas pond cummings, Professor of Law; Charles R. DiSalvo, Woodrow A. Potesta Professor of Law; Marjorie McDiarmid, Steptoe & Johnson Professor of Law & Technology; Patrick C. McGinley, Judge Charles H. Haden II Professor of Law; William Rhee, Associate Professor of Law; Michael V. Risch, Associate Professor of Law; Caprice L. Roberts, Professor of Law; John E. Taylor, Professor of Law; Hollee S. Temple, Teaching Associate Professor; and Valerie K. Vojdik, Professor of Law. Each of these individuals supported this project in intangible ways for which I am grateful.

The author is also grateful for the research assistance of the following West Virginia University College of Law students: Luke A. Boso, Keith R. Hoover, David Stackpole, and Matthew T. Yanni. The author is especially grateful for the research assistance of Meghan Brooke Phillips.

Finally, the author is grateful for the loving support and patience of her family throughout this project: Jim Heiko, Giorgianna Rose Heiko, Helen Lofaso, Mary Lofaso, Frank Lofaso, George Lofaso, Toni Lofaso, Caroline, Frankie, and little Joseph.