



CONSTITUTIONAL RIGHTS TO RELIGIOUS EXPRESSION IN THE PUBLIC SCHOOL CONTEXT

By way of introduction, ADF is a legal alliance defending the right to hear and speak the Truth through strategy, training, funding and litigation. ADF has been established, in part, to protect our cherished freedoms and to restore rights guaranteed by the Constitution.

Although students have long possessed the right to engage in religious expression in public schools, districts throughout our country often prohibit them from exercising these rights based on an incorrect view of the law. The discussion that follows addresses the current state of the law concerning the right to free speech in public schools.

STUDENTS' RIGHTS

Do students have First Amendment rights to express their religious beliefs at school?

Students retain their First Amendment liberties while on campus. They have the right to share their beliefs, pray, evangelize, read scripture, and invite students to participate in such activities so long as they are voluntary, student-initiated, and not disruptive or coercive. A school may not prohibit student expression during non-instructional time unless it (1) substantially interferes with the operation of the school, or (2) infringes on the rights of other students.¹ A school may not prohibit student expression solely because others might find it offensive.²

Can students express their religious beliefs during class?

While in class, students are free to express their religious views in a class discussion or as part of an assignment, so long as the expression is relevant to the subject under consideration and meets the requirements of the assignment. The school cannot prohibit religious expression in class unless they have a legitimate pedagogical purpose for doing so.³

Can students distribute religious material at school?

Yes. As with any material, if it (1) substantially interferes with the operation of the school, or (2) infringes on the rights of other students, then the school can prohibit it. But schools may not impose an outright ban on religious materials if they allow students to distribute non-religious materials.⁴

¹ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969).

² *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007) (rejecting use of “offensiveness” standard for regulating student speech because “much political and religious speech might be perceived as offensive to some”).

³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁴ *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).

Can students form religious clubs at school?

Under the federal Equal Access Act (and the First Amendment⁵), secondary school⁶ students may form religious clubs and meet on campus if the school receives federal funds and the school allows other non-curriculum related clubs to meet during non-instructional time.⁷ Moreover, religious clubs must be given equal access to all school facilities, resources, and equipment that are available to other non-curriculum related clubs.⁸ These clubs must be student-led and student-initiated. Teachers may be present at club meetings, but they may not participate in club activities.⁹

Elementary school students similarly have a right to meet in after-school religious clubs if the school opens its facilities to community groups.¹⁰ Here, teachers and adult community members may not only be present, but may participate in the club's activities, including engaging in prayer, leading the group, etc.¹¹

Is it true that students can pray at school?

Since prayer is private speech, students may engage in it at school, as long as it would not appear that the school endorsed it.¹² Thus, students may pray at school on their own or in groups during non-instructional time so long as it is not disruptive or coercive. This includes praying as a team before a game or practice, as long as it is completely student-led and initiated.¹³

Can students pray at their high school graduation, or hold baccalaureate ceremonies?

The constitutionality of a graduation message, including a religious message, hinges on whether it is considered private speech – or, in other words, whether an objective observer would view the message as a “state endorsement of prayer in public schools.”¹⁴ A school policy containing the following elements should prevent any appearance of endorsement: 1) The school creates a time at graduation for a student to speak on a matter of his or her own choosing; 2) Neutral criteria determine which student(s) is (are) allowed to speak during this time; 3) There is no involvement or prior review of the speaker's message by the school or school staff; and 4) Students are instructed that their speech may not materially and substantially interfere with the graduation ceremony, or be vulgar, lewd or obscene.¹⁵

Similarly, a school may permit a baccalaureate ceremony with religious content on its property when the event is sponsored and organized solely by private parties and when the school opens

⁵ *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002).

⁶ Secondary schools are defined pursuant to State law and include high schools, and in many states, middle schools.

⁷ 20 U.S.C. § 4071.

⁸ *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 247 (1990); *Prince*, 303 F.3d at 1085-90.

⁹ *Mergens*, 496 U.S. at 236.

¹⁰ *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

¹¹ *Wigg v. Sioux Falls School District*, 382 F.3d 807 (8th Cir. 2004).

¹² *See Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1082 (11th Cir. 2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992); *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000).

¹³ *See Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405 (5th Cir. 1995) (noting that while coaches were not permitted to lead or participate in prayer, students could still do so.)

¹⁴ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

¹⁵ *Tinker*, 393 U.S. at 509; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986). For an example of a constitutional graduation policy, *see Adler*, 206 F.3d at 1072. *But see Cole v. Niemeyer*, 228 F.3d 1092 (9th Cir. 2000) (the Ninth Circuit held that allowing a sectarian prayer and message at graduation would violate the Establishment Clause).

up its facilities to community groups generally. A private religious event that happens to be graduation-related simply does not pose a constitutional problem.

Can students offer a prayer before the beginning of a sporting event?

Private speech even at school-related functions is protected by the Constitution. Courts have held that school policies which equate all student religious speech with State speech go too far and actually violate an individual's free speech rights.¹⁶ A school does not need to prohibit private religious speech in public places in order to avoid violating the Establishment Clause.¹⁷ The test is whether the prayer is genuinely student-initiated and student-led, and not part of a school policy which encourages or endorses it. Similar to the guidelines noted above for graduation, a school can allow a pre-game message to be given by a neutrally selected student, and the message chosen by the student, whether religious or not, should be permissible. This should prevent any appearance of endorsement regarding student messages, including those that may be religious in nature.

Can students wear religious clothing to school?

Schools may not single out religious clothing or clothing displaying a religious message for unfavorable treatment. Students may wear religious clothing required by their religion to the extent that other like articles of dress are permitted. Clothing or jewelry bearing a religious message is treated as speech, and cannot be restricted unless it (1) substantially interferes with the operation of the school, or (2) infringes on the rights of other students.¹⁸

Does the Establishment Clause justify restrictions on student religious expression?

Schools cannot claim that the so-called "separation of church and state" justifies banning religious expression on campus. The school does not endorse student speech. Indeed, courts have made it very clear that the school's obligation is to educate the audience about the First Amendment, not silence the speaker out of fear that the audience will misperceive that the school, by allowing the speech, is endorsing it.¹⁹

CONCLUSION

There are many students across our country unnecessarily facing hostility and censorship when exercising their constitutional rights on campus. It is our hope that the above discussion clarifies this important area of the law. If you have any questions or would like free legal advice on a specific situation, please feel free to contact us at 1-800-TELL-ADF.²⁰

Sincerely,

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¹⁶ *Chandler*, 230 F.3d at 1316 ("The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all").

¹⁷ *Id.*

¹⁸ *Tinker*, 393 U.S. at 509.

¹⁹ *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004); *Hedges*, 9 F.3d at 1300; *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003).

²⁰ **Disclaimer:** By printing and distributing this guide, the Alliance Defense Fund, Inc. (ADF) is not providing legal advice, and the use of this document is not intended to constitute advertising or solicitation and does not create an attorney-client relationship between you and ADF or between you and any ADF employee.