

Expression of Religion in Public Schools

by Theresa Lynn Sidebotham

This article discusses the intersection of religious expression and public schools. It focuses on the Equal Access Act, student speech, school personnel speech, access for community viewpoints, and released time.

Confusion is widespread as to what may be taught, expressed, or otherwise introduced onto the premises of the nation's public schools. "Nowhere has the proper line of demarcation [in the appropriate amount of separation between church and state] been more difficult to define than in our nation's public schools."¹ As the Tenth Circuit has said:

So long as the state engages in the widespread business of molding the belief structure of children, the often recited metaphor of a "wall of separation" between the church and the state is unavoidably illusory.²

Conflicts between belief systems arise in various ways, and the testing ground lies at the intersection—or collision—between the Establishment and Free Exercise Clauses of the U.S. Constitution:

In the milieu of public education, there is not an impregnable wall of separation. Rather, the inevitable conflicts . . . dictate that there must be some measure of accommodation to avoid the constitutionally impermissible result of totally subordinating either religion clause to the other.³

Case law dictates the steps of this complicated process, which, when approached with care, preserves the integrity of religious practice, free choice, and the government's interest in education.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...."⁴ As discussed in detail below, the Free Exercise Clause has several common law tests that are used to analyze a Constitutional challenge to a policy or practice.

To evaluate a school policy under the Establishment Clause, the courts consistently use the *Lemon* test, which approves the policy if: "(1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion."⁵ The Tenth Circuit uses a hybrid *Lemon* test with three prongs. It always asks: first, "whether the gov-

ernment conduct was motivated by an intent to endorse religion"; and second, "whether the conduct has the effect of endorsing religion." If the government has involved itself with a religious institution, it also asks whether there is excessive entanglement.⁶

This article gives an overview of five areas where questions about the interplay between the First Amendment and education commonly arise. These areas are: (1) the Equal Access Act; (2) student speech; (3) speech for school personnel; (4) access for community points of view; and (5) released time.

The Equal Access Act in Light of Recent Developments

The Equal Access Act, passed in 1984, protects the rights of public high school student groups to meet on publicly owned property, even for a religious purpose. The basic outline of rights under the Act has developed through case law. Recent developments in the U.S. Supreme Court may fundamentally change how the Act is interpreted.

Basic Provisions of the Equal Access Act

The Act provides:

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.⁷

The Act defines "fair opportunity" as follows:

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—

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- 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) 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 of student groups.⁸

The year after the Act was passed, it was tested. A high school student group asked permission to form a Christian club, which the school refused to approve. The students filed suit.⁹ At issue was both the constitutionality of the Act and whether the school had a “limited open forum,” defined by the Act as when a school “grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time.”¹⁰ The Court concluded that the school’s existing student groups included one or more “noncurriculum related student groups,” such as scuba and chess.¹¹ Because the school had a limited open forum, it was required to give the religious group equal access.¹² In addition, the Court held that the Act does not facially violate the Establishment Clause, and a “school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”¹³

Cases continued to test the parameters of the Act.¹⁴ In 2008, students in California applied to form a Bible club and the school

denied their charter.¹⁵ The school denied that it had created a limited open forum, but the court found that it had likely done so when it chartered the Red Cross Club.¹⁶ Not only was the school strategically approving or denying club applications based on viewpoint, it also apparently began to enforce its policy only when confronted with a religious club.¹⁷

Another case considered the meaning of noninstructional time. The court held that the school had to permit the local Bible club to meet during its activity period, which qualified as noninstructional time because there was no actual classroom instruction going on then.¹⁸ The court pointed out:

Just as putting a “Horse” sign around a cow’s neck does not make a bovine equine, a school’s decision that a free-wheeling activity period constitutes actual classroom instructional time does not make it so.¹⁹

When a group has the right to access, it should receive the same treatment and benefits as other groups. One case stated a Christian club should: (1) receive student club funding; (2) be included in the yearbook free of charge; and (3) have the same access to the public address system and bulletin boards (but not to pray or proselytize through the public systems).²⁰ On the other hand, it could not have access to district funds, because the Act provides that a school may not “expend public funds beyond the incidental cost of providing the space for student-initiated meetings.”²¹ Another case held that a Christian student club would be likely to prevail on the issue of making announcements on the public address system and broadcasting its promotional video like other clubs.²²

Membership Limited by the Student Club

The Equal Access Act says nothing about membership standards students may impose on their own clubs. The concept of limited membership may be affected by a recent U.S. Supreme Court case.

The Second Circuit considered the issue in 1996, when a high school club included a charter provision that only Christians could be club officers.²³ The school refused recognition on the ground that the provision violated the school policy prohibiting all student groups from discriminating on various grounds, including religion.²⁴ The students argued that “forcing the Club to accept the possibility of non-Christian officers” could change the form and content of the club.²⁵ The court accepted the argument only with respect to the three leadership positions that really safeguarded the Christian content of the club.²⁶ It concluded that the

religious test for leadership positions has been made purely for expressive purposes—to guarantee that meetings include the desired worship and observance—rather than for the sake of exclusion itself.²⁷

The court concluded the students had been denied equal access.²⁸

In a 2008 Ninth Circuit case, students applied to form a club called Truth, with meetings open to everyone, but voting membership limited to professing Christians.²⁹ The school district rejected the application, based primarily on the membership restrictions.³⁰ The court held for the district on the basis that the district’s non-discrimination policies did not discriminate against religious speech, and that religious groups were accorded the same rights and privileges as other student groups.³¹

In 2009, a similar case arose in a university setting, when Christian student groups did not wish to comply with the university’s nondiscrimination policy.³² The court considered the *Truth* case

and reached a similar result on the ground that the university was a limited public forum that could “restrict access to its recognized student organization forum so long as the restrictions are viewpoint-neutral and reasonable in light of the purposes served.”³³

In 2010, the U.S. Supreme Court heard a similar case about the student branch of the Christian Legal Society (CLS) at the University of Hastings College of Law.³⁴ According to the majority in *CLS v. Martinez*, Hastings had a nondiscrimination policy that required the acceptance of all comers to any club, regardless of whether they agreed with the aims of the club, but CLS required a statement of faith for its members.³⁵ The Court upheld the reasonableness and viewpoint neutrality of the Hastings all-comers policy.³⁶

In the Ninth Circuit, the reasoning of *CLS v. Martinez* likely would apply to Equal Access Act cases, and other circuits could follow, given the strong factual and policy similarities. The Equal Access Act permits students to form religious clubs, but the issue would be whether schools may require that anyone be permitted to be official members. Whether a religious club (or any other) can keep its identity under such restrictions remains to be seen.

Religious Student Speech is Broadly Permitted

Neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁷ However, “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³⁸ Much of the case law in this area results from one side or

other attempting to take an extreme position. As the Seventh Circuit commented, while affirming a student’s religious rights, but upholding the school district’s overall code:

[W]e express our sympathy with [student’s] frustration at the way school officials handled this whole affair. [Student] wanted to distribute a simple flier inviting friends to a church-sponsored activity. Regrettably, the principal’s evasive reaction got in the way of an accommodating resolution.³⁹

In *Tinker*, the seminal test for student speech, students wore a black armband to protest the war in Vietnam and were suspended.⁴⁰ The Court held that students may express their opinions, even on controversial subjects, if they do so without “materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”⁴¹

Student speech sponsored by the school is a little trickier. The *Hazelwood* test was formed in response to a school censoring student articles for a school newspaper.⁴² The Court concluded the school could exercise “editorial control over the style and content of student speech in school-sponsored expressive activities as long as their activities are reasonably related to legitimate pedagogical concerns.”⁴³ These tests control the analysis of different types of student religious speech.⁴⁴

In addition, schools may impose a viewpoint-neutral restriction on speech if it

further an important or substantial government interest; if the interest is unrelated to the suppression of student expression;

and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.⁴⁵

In the Tenth Circuit, educators' restrictions on school-sponsored speech need not even be viewpoint neutral. A school is permitted to sponsor only one point of view—such as opposing illegal drug use.⁴⁶ This would not apply to private student religious speech.

Student Prayer

The U.S. Department of Education has offered useful guidance summarizing constitutionally protected school prayer.⁴⁷ The following principles apply: (1) students may pray or use religious speech during noninstructional time; (2) students may organize prayer groups and meetings, such as “see you at the pole” gatherings; (3) students may pray—or not—during an official moment of silence; (4) students may be excused from instructional time for religious obligations in some cases; and (5) public student religious speech is permissible where not attributable to the school itself.⁴⁸

School-sponsored moments of silence are generally constitutional. Under the *Lemon* test, a secular purpose may be met by quiet reflection, silence does not advance or inhibit any particular religion, and there is no excessive entanglement in remaining silent.⁴⁹ However, the teacher or school may not overtly treat it or promote it as a prayer time.⁵⁰

Students may pray aloud, either alone or in front of an audience. As long as “the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected.”⁵¹ Students

may pray in the context of their athletic teams or in other school settings.⁵² However, student-led invocations at football games are not private speech, because they are authorized by government policy and take place on government property.⁵³ They also place the minority view at the mercy of the majority view.⁵⁴ For the school to sponsor such an invocation violates the Establishment Clause.⁵⁵ Similarly, although a student club may have access to the public address system, it may not use the time for a prayer or devotional to a captive audience.⁵⁶

Distributing Religious Material

A number of cases have considered whether students can distribute religious materials, such as candy canes with a religious message, pencils with a religious message, or tickets to religious programs. Distributing a candy cane with a religious message is private, expressive speech protected by *Tinker*.⁵⁷ The school may control such distribution with a viewpoint-neutral policy that imposes a time, place, and manner restriction.⁵⁸ Where a school allowed distribution before and after school, during recess, and at specified points, the policy served the interest of controlling chaos, was sufficiently narrowly tailored, and allowed alternate forms of expression.⁵⁹ Under the *Hazelwood* analysis, it makes a difference whether items such as candy canes with a religious card are distributed privately, or as part of a school-sponsored project, because not offending others is a legitimate pedagogical concern.⁶⁰

Courts may reject an overly narrow distribution policy, such as a policy that limited the distribution of literature to before and after school.⁶¹ A school cannot take entirely private speech, such as distributing religious fliers, impose such a difficult approval process that it can claim the speech is school-sponsored, and then forbid the distribution under *Hazelwood*. A court will find that the student has rights under the *Tinker* analysis, and the school must show substantial disruption.⁶²

Under an Establishment Clause analysis, allowing students freedom to promote their own religious view is not school-sponsored.⁶³ Ironically, the screening of student materials may itself cause excessive entanglement.⁶⁴

Symbolic Physical Expression and Religious Apparel

Much symbolic expression is protected. A pro-life student tried to wear a black and red tape armband saying “Life” and tape over her mouth as part of the Pro-Life Day of Silent Solidarity, which the school forbade on the basis that religious material was not allowed.⁶⁵ The school showed no reasonable fear of disruption and was not allowed to prevent the student from wearing the armband.⁶⁶ However, a student could not wear clothing with religious messages in contravention of a properly enacted uniform policy, because valid uniform policies can be viewpoint- and content-neutral, further a significant government interest, and leave other forms of expression open.⁶⁷

Wearing religious jewelry such as rosaries is protected speech, and receives a *Tinker* analysis, so the school must show that the speech “caused a substantial disruption of or material interference with school activities”—a general fear that the rosary could be a gang identifier is not sufficient.⁶⁸ In an interesting compromise, the Seventh Circuit held that a basketball association could prevent Jewish students from playing basketball games wearing yarmulkes precariously fastened by bobby pins, but remanded so plaintiffs could propose a more secure head covering that complied with

both Jewish law and safety concerns.⁶⁹ On the other hand, a school district could not prevent a Native American student from wearing his long hair in braids as part of his sincere religious belief, because the school's stated interests in promoting safety and hygiene and avoiding disruption were not compelling.⁷⁰

Cases about whether a student can wear clothing with a derogatory and critical message (religious or otherwise), such as an anti-gay T-shirt, often turn on the specific facts of the case. Some cases protect such clothing as student protest speech under the *Tinker* standard.⁷¹ Alternatively, such clothing may cause substantial disruption under the *Tinker* standard.⁷²

Religious Expression at Graduations

A school may not sponsor prayer at graduation ceremonies. One court held that for the choir to sing the Lord's Prayer at graduation violated the Establishment Clause.⁷³ Although prayers at graduation also may not be offered by clergy,⁷⁴ the rules are more complex for students. In a Colorado case, a valedictorian unexpectedly added some religious content to her graduation speech, and was forced to e-mail a widespread public apology to receive her diploma. The court held that student speeches at a graduation are school-sponsored when the school limits the opportunity to speak and exercises editorial control by screening the content of the speeches. When that is so, the school may limit the content, including religious content, in a reasonable manner. Screening speeches is reasonably related to pedagogical concerns.⁷⁵

On the other hand, if the school policy allows the graduating class to choose a student to deliver a message of the student's choice without review by school officials, that is private speech. It does not violate the Establishment Clause if the message happens to be religious.⁷⁶

A school could require a Native American student to wear a cap and gown for graduation over his traditional clothing. Requiring students to wear their caps and gowns while receiving the diploma "is reasonably related to the school board's legitimate interest" in demonstrating the unity of the class and celebrating academic achievement under *Hazelwood*.⁷⁷

School Projects and Class Content

Courts have evaluated religious content in school projects in different ways. In one case, an elementary school refused to hang a kindergarten student's poster because of religious content, though the poster was otherwise responsive to the assignment. The Second Circuit held that such viewpoint discrimination was unconstitutional even if reasonably related to a pedagogical interest.⁷⁸ However, the Sixth Circuit has held that it was not a violation of student free speech for a teacher to refuse to accept a research paper when the topic chosen by the student without the teacher's consent was religious.⁷⁹

When parents objected to textbook content they found offensive, the Sixth Circuit found that, because the textbooks at issue could not be said to be endorsing one viewpoint over another, they imposed no unconstitutional burden under the Free Exercise Clause.⁸⁰ Similarly, the Tenth Circuit considered a Jewish student's objections to the Christian content of many of the choir songs and the fact that the choir often sang at religious sites. The court found a secular purpose, because much serious choral music is religious, and religious venues often are acoustically superior.⁸¹ Because the

student was given a choice of not participating with no adverse effect on her grade, she had no free exercise claim.⁸²

The Parameters of Free Exercise Rights for School Personnel

Public school personnel do not lose their constitutional rights—specifically free exercise of religion and free speech—when they enter school grounds. However, the doctrines in this area are in tension, the constitutional tests are complicated, and it can be difficult to predict how courts will rule. First Amendment decisions in the public sector are scrutinized at a heightened or intermediate level rather than at a strict level. This means:

[T]he challenged government action must be substantially related (rather than narrowly tailored) to promoting an important (rather than compelling) government interest . . . because First Amendment rights are limited in the public employment context by a government's need to function effectively.⁸³

Teachers Have Limited Rights

Teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸⁴ At the same time, there is no question that public schools have broad latitude to control speech and other types of expression by teachers at school. It often is difficult to determine precisely how far teachers' rights extend. Several tests overlap, as courts consider the Free Exercise, Establishment, and Speech Clauses.

Courts use different tests to analyze teacher speech. The Tenth Circuit begins with the *Hazelwood* test and a forum analysis.⁸⁵ The Tenth Circuit uses *Hazelwood* for school-sponsored teacher speech such as classroom expression and *Pickering* for teacher speech in other situations “that would not reasonably be perceived as school-sponsored.”⁸⁶ The *Pickering* balancing test arises under the Speech Clause; this test was not developed for religious speech specifically but for public employee speech generally.⁸⁷ Some other circuits use *Pickering* more broadly.⁸⁸

Hazelwood asks whether there is a public forum, and next whether the speech is school-sponsored (which in the Tenth Circuit has been answered before using the *Hazelwood* test).⁸⁹ Finally, it asks whether the “actions taken by the school are reasonably related to legitimate pedagogical interests.”⁹⁰

Under *Hazelwood*, the forum analysis divides government property into “three categories: public fora, designated public fora, and nonpublic fora.”⁹¹ Usually, the school classroom is not a public forum.⁹² Where there is no public forum, school officials may impose reasonable restrictions on speech.⁹³ For example, the school can order a teacher to refrain from engaging in religious speech.⁹⁴ It must show only that it has legitimate pedagogical interests in the speech restrictions, which typically is not a difficult burden to carry. For example, allowing the students and the community to participate in painting tiles during the reconstruction of Columbine High School was a reasonable pedagogical interest in a closed forum. It reacquainted the students with the school and promoted community healing.⁹⁵ Thus, the school could restrict the content of the tiles almost completely. In a case where a teacher wanted to post

materials on a bulletin board reflecting a differing viewpoint from the school’s gay and lesbian awareness month, the court held that the bulletin boards were speech by the school itself, rather than an individual. The school had a right to control the contents of its closed forum.⁹⁶

If the school has opened the forum at all, it likely has created a limited (or designated) public forum. A typical example is a school board meeting/hearing room. In that case, the government regulation of speech must be viewpoint neutral. For instance, if teachers are allowed to post other personal messages or opinions, a religious message cannot be excluded, as long as it “does not materially disrupt school work or cause substantial disorder or interference in the classroom.”⁹⁷ Where other teachers were permitted to hang banners expressing various religious and non-religious points of view, the school was wrong to prohibit a teacher from hanging banners expressing a Judeo-Christian point of view.⁹⁸

If the speech is not school-sponsored, the *Pickering* test applies, even in the Tenth Circuit. This test asks whether the employee was speaking as a private citizen on a matter of public concern.⁹⁹ A matter of public concern includes any matter of political, social, or other concern to the community.¹⁰⁰ If the speech is a matter of public concern, the court looks at the second prong of the test, which is whether the employee’s interest in First Amendment expression outweighs the public employer’s interest in regulating the workplace.¹⁰¹

When speech is not a matter of public concern, such as curricular speech, *Pickering* does not protect it, so there is no free speech protection.¹⁰² Thus the *Pickering* test arrives at the same spot as the *Hazelwood* analysis. Curriculum may be defined very broadly, and includes school-sponsored publications, choice of school play, teacher bulletin boards, and other activities that might be perceived to be endorsed by the school.¹⁰³ Under this analysis, a school was within its rights when it took down material posted by a teacher on his classroom bulletin board because it had some religious content.¹⁰⁴ In another case that applied the balancing test to whether a teacher had to teach evolution as prescribed by the curriculum, the court determined that the teacher’s responsibility as a public school teacher overrode his First Amendment right as a private citizen.¹⁰⁵

Speech that is a matter of public concern is treated differently. Such speech would fall outside the realm of both the *Hazelwood* and *Pickering* tests. This test balances the employer’s versus the employee’s interests. Religious speech, including symbolic speech such as wearing a cross, is a matter of public concern, according to some courts.¹⁰⁶ Under this test, a public school could not prohibit employees from wearing items of jewelry, such as a cross, expressing a religious viewpoint. As an initial matter, prohibiting religious jewelry was content- and viewpoint-based discrimination and, further, there was no reason to suppose wearing such jewelry was disruptive, controversial, or caused distractions in the work place.¹⁰⁷

Yet another test exists under the Establishment Clause. Although the cases have different outcomes, the key to the analysis is whether, in the relevant context, the school appears to be endorsing religion.¹⁰⁸ For instance, prayers at mandatory faculty meetings failed the test because the government was endorsing religion.¹⁰⁹ In another case, there was no Establishment Clause violation if teachers prayed at school privately, away from students.¹¹⁰

Establishment Clause concerns likely will prevent a teacher from wearing an openly religious T-shirt.¹¹¹ Under the Establish-

ment Clause, a school can order a teacher not to use religious language in writing to parents or talking to students.¹¹² In a fairly extreme holding, the Tenth Circuit decided that when a teacher read his Bible during the quiet reading period and had two Christian books on his shelves, he appeared to be endorsing a particular religion on behalf of the school.¹¹³ The dissent pointed out that books about other religions were not also removed, and would have found that the teacher's Free Exercise rights controlled, because it was private speech that created no substantial interference with the workplace.¹¹⁴

The Establishment Clause test requires some clear connection to school-endorsed activities, and will not reach situations where teachers engage in private acts that can be only remotely connected to the school. For example, in one case, the school told a teacher she could not participate in an after-school Good News Club because of Establishment Clause concerns. The court held there was no Establishment Clause problem because, even though the club meetings were on school property, it was not a school-sponsored event.¹¹⁵ The use of the school in this situation constituted a public forum, and preventing employees from participating in religious activities at an event that was not school-sponsored was viewpoint discriminatory and *per se* unconstitutional.¹¹⁶ In the same way, principals or staff members could likely speak or pray at a privately sponsored baccalaureate service, because such speech would be private with no government endorsement.¹¹⁷ The analysis of what is permissible seems to depend not only on the choice of tests, but on whether the court begins the analysis with the Free Exercise Clause or the Establishment Clause.

Coaches and Student-Led Team Prayer

Coaches are restricted in the extent to which they can join student prayer. The Third Circuit considered a case where a coach had a practice of bowing his head and taking a knee during a student-led prayer.¹¹⁸ The court first used the two-prong *Pickering*-style analysis, finding that the coach's speech was not a matter of public concern, because in this context there was no public forum.¹¹⁹ Thus, it did not trigger protection of his right, as an employee, to freedom of speech, and the district could forbid him from bowing his head.¹²⁰ The same result was reached through an Establishment Clause analysis when the court found that because coaches are present at games as school representatives, their actions represent district policy. For a coach to join student prayers entangles the district in religion.¹²¹

School Boards and the Legislative Prayer Exception

A legislative prayer exception likely covers prayer at school board meetings, the same way it does for Congress and other legislative bodies.¹²² The "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."¹²³ A school board meeting is not like graduation or extracurricular student activities.¹²⁴ For one thing, students are only minimally present. Thus, a school board may have a policy permitting an opening prayer. Brief sectarian references do not change that analysis.¹²⁵ However, the prayer may not be exploited to proselytize for a particular religion or advance or disparage any particular religion.¹²⁶

Access to Schools for Religious Points of View From the Community

Equality of treatment drives the analysis of access to schools for religious points of view. Although school officials often are afraid of violating the Establishment Clause by appearing to endorse a religion, the holdings in this area are fairly consistent and allow considerable access by religious groups if there is comparable access for other groups.

Government Speech or Private Speech

As with teacher speech, courts consider whether the speech involved is government speech or private speech, because government speech may not be religious.¹²⁷ If the government has created a forum that allows private speech, it may not restrict the private speaker's message based on viewpoint.¹²⁸ For example, when a school sent a third-party order form home for parents to order holiday cards decorated with their children's artwork, blacking out the only option for parents to select a religious message was unconstitutional viewpoint discrimination.¹²⁹ Also, if the school permits employees to post personal announcements on a bulletin board covering a broad range of topics, the postings are not government speech. It follows that the school may not exclude religious messages from being posted, because that is viewpoint-based discrimination.¹³⁰

Access for Community Groups to Use School Property

If nonreligious groups are allowed to meet on school property and advertise their activities, then religious groups, such as a parent prayer group, are entitled to similar access. The religious group should neither be excluded nor favored by receiving special privileges.¹³¹ For instance, if there is a parent room for parent groups that is off-limits to students, it is proper, and indeed required, to allow a parent prayer group to use it. Not doing so would demonstrate hostility toward religion and create a greater risk of impermissible entanglement.¹³²

In the seminal case, *Good News Club v. Milford*, the school district opened its facilities for a wide variety of organizations, but excluded religious ones.¹³³ The Good News Club, an overtly evangelical group, sued for access. The Supreme Court held that the exclusion of the Good News Club was viewpoint discrimination.¹³⁴ As to the Establishment Clause, the Court held:

[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious view if the Club were excluded from the public forum.¹³⁵

Access for Community Groups to Advertise Their Programs

Schools often allow community groups to distribute literature about programs, post information on bulletin boards or school walls, or participate in school open houses or back-to-school nights. The analysis is the same for all of these uses.¹³⁶ Schools need not allow this access to anyone at all, but if they do, they have created some sort of limited public forum.¹³⁷ A limited public forum may not discriminate on the basis of viewpoint.¹³⁸ Some restrictions are "permissible if they are viewpoint neutral and reasonable in light of the purpose served by the forum."¹³⁹ An example

of a viewpoint-neutral access is a bulletin board limited to certain organizations, such as the parent-teacher association (PTA) or other school-based agencies.¹⁴⁰ Another reasonable restriction is to exclude fliers that directly promote religious observance or that proselytize, while allowing fliers that advertise events that will include religious observance or proselytization.¹⁴¹

If other community groups are allowed to send fliers home, religious groups also should have access to the flier forum, as long as the fliers do not convey that the religious activity is sponsored or promoted by the school.¹⁴² For instance, fliers that advertise a Christian summer camp must be distributed when the district distributes literature for secular summer camps.¹⁴³ As long as the school distributes fliers that advertise religious and nonreligious community events, no reasonable observer will conclude there is an endorsement of religion.¹⁴⁴ If only religious fliers were refused, students might conclude that the school disapproves of religion, which would be undesirable.¹⁴⁵ In a case where a parent challenged the school for permitting the Boy Scouts to distribute literature and information on the basis that the Boy Scouts are religiously based, the court held there was no Establishment Clause violation, because the Boy Scout distribution followed general policies applying to all organizations.¹⁴⁶

The Fourth Circuit has held that when a school allowed take-home fliers from secular organizations it could not exclude one offered by Child Evangelism Fellowship (CEF).¹⁴⁷ The school incorrectly believed it would be endorsing the evangelical group's point of view and would be coercing students.¹⁴⁸ The court disagreed, because CEF did not receive a special benefit—students retrieved, and possibly took home, materials from more than 225 organizations during the school year.¹⁴⁹

The case was remanded and then returned to the court two years later. This time, the district had enacted a policy limiting fliers to five categories of groups: (1) the district itself; (2) other government agencies; (3) PTAs; (4) licensed day-care programs; and (5) nonprofit organized youth sports leagues.¹⁵⁰ Perhaps not coincidentally, CEF did not fit any of these categories. Without determining exactly what kind of forum had been created, the court held that the "government restrictions on private speech must be both reasonable and viewpoint neutral."¹⁵¹ Although it was not *per se* a problem that the new policy also excluded CEF, the court held that, because the district had unbridled discretion to approve all fliers that fit into the five groups and even to withdraw approval for fliers, there was no protection against viewpoint discrimination.¹⁵²

In another CEF case, a district refused to allow CEF to distribute fliers or staff a table at back-to-school night.¹⁵³ The district's concern was that CEF promoted a religious point of view, might be controversial, and proselytized as an organization.¹⁵⁴ The court stated firmly that it was impermissible viewpoint discrimination to exclude groups because they were controversial or proselytizing.¹⁵⁵ Conversely, granting equal access would not be endorsing religion or fostering government entanglement.¹⁵⁶ The court granted an injunction allowing CEF to distribute the materials.¹⁵⁷

Bible Distribution in Public Schools

Distributing Bibles in schools is problematic. In some areas, groups such as Gideons International have distributed Bibles in schools, usually to fifth grade students in the classroom. Under this, scenario an Establishment Clause violation seems well established,

given the captive audience and the apparent endorsement by the school.¹⁵⁸ In one recent case, after a lawsuit successfully challenged the practice of handing out Bibles in the classroom, the district changed its policy to allow a wide variety of approved material to be distributed at a table during non-instructional time.¹⁵⁹ The district court permanently enjoined the school district from “allowing distribution of Bibles to elementary school children on school property at any time during the school day,” possibly because it thought the new policy was pretextual. The circuit court affirmed the injunction.¹⁶⁰

Not surprisingly, a principal distributing Bibles in his or her office also violates the Establishment Clause because of entanglement and the appearance of endorsement.¹⁶¹ Assuming that the motive is not pretextual, it may be permissible to offer Bibles passively from a table set up on school property, where religious and nonreligious materials are offered, without any involvement from school officials. It is not permissible to set up that same table right outside the principal’s office, or in some similarly impressive and apparently endorsed setting.¹⁶² What would be permissible is a neutral, open access policy where a broad class of group had access to the forum¹⁶³ (such as a back-to-school night).

Clergy Access to Public Schools

A few cases have dealt with clergy volunteers in the schools. For clergy to volunteer is not a *per se* problem. However, one clergy volunteer counseling program was found unconstitutional. Because non-clergy counseling and mentoring was not generally available,

the policy was non-neutral and impermissibly favored religion.¹⁶⁴ Thus, if clergy are to have access, it must be as part of a broader program.

Religious Education During Released Time

Released time has been around since 1914, though it is not widely understood.¹⁶⁵ Under released time, a public school permits children to leave campus for religious education during the school day, if the parents give permission. Although it often is associated with the Church of Jesus Christ of the Latter Day Saints, Catholic and Protestant groups also make use of released time. As many as 500,000 students across the country may participate in released time programs.¹⁶⁶ Released time is constitutional, as long as it is kept within certain parameters.

Unlike many states, Colorado does not have a statute on released time, but the administrator of each school may excuse absences.¹⁶⁷ Thus, in Colorado, whether to allow released time is a decision made by each local school or school district.

Only a handful of cases discuss released time, but their holdings are fairly consistent. The U.S. Supreme Court has held that released time is constitutional if the public school is not unduly entangled with the religious institution providing the program.¹⁶⁸

The Tenth Circuit evaluated released time to determine whether it violated the Establishment Clause, using the *Lemon* test.¹⁶⁹ It held that school released time is permissible as long as the school’s policy: (1) has a secular purpose; (2) does not endorse the practice of any religion; and (3) does not create excessive gov-

ernment entanglement.¹⁷⁰ The desire to accommodate the public in its spiritual needs satisfies the secular purpose prong. Merely releasing students, at their parents' request, "during school hours to attend religious courses does not unconstitutionally advance or inhibit religion,"¹⁷¹ which satisfies the primary effects portion of *Lemon*. As for entanglement, a *de minimis* amount is permitted, but the school must be careful to select the least entangling administrative alternatives.¹⁷² For instance, the Tenth Circuit held that "released-time personnel [must] transmit attendance reports to the public school," rather than having public school personnel do so.¹⁷³

Other jurisdictions are consistent. A Second Circuit case reaffirms that released time is constitutional when no religious instruction takes place at the school, no public funds support the released time program, and the school does not promote the program beyond collecting permission slips from parents.¹⁷⁴

Released time has constitutional limitations. Religious instruction may not take place in the public classroom or involve public funds.¹⁷⁵ Even if the classes are technically off-campus, classes may not even appear to be part of the school. Classes in remodeled school buses parked on or near the school campus violated this principle.¹⁷⁶ It is unconstitutional for public school teachers to teach the released time program, even for no extra pay.¹⁷⁷ Personnel from the released time program may not enter the public school classrooms to recruit students.¹⁷⁸ School authorities may not "persuade or force students" to participate in released time programs.¹⁷⁹ Requiring attendance for the released time program satisfies a legitimate public interest in keeping track of students during school hours, but attendance records should be handled in a way that puts the least burden on the public school.¹⁸⁰ Granting school credit on the basis of neutral, secular criteria is permissible, but has been challenged.¹⁸¹ Schools may not, however, create a system where school officials must evaluate the religious content of released time courses to ensure they are "credit worthy." Such a system excessively entangles government with religion.¹⁸²

When these various restrictions are observed, released time is a constitutional way to accommodate the free exercise of the religious beliefs of parents and students. Colorado schools and school boards should carefully observe these limitations when structuring a released time program.

Conclusion

Religious expression in the public schools is a delicate balance between free exercise rights and the Establishment Clause. Although religious rights are broader than is commonly thought, they must be limited to respect the rights of others. Students and teachers should neither have their beliefs squelched nor be made to feel religious expression is unwelcome. Other students or adults required to be present at school should not be a captive audience to religious ideas from another tradition. The government—in the form of the school district—should convey neither hostility to nor endorsement of any religion. Clumsy handling of these doctrines, even erring on the side of prohibiting all types of religious materials, may result in actionable violations, which ultimately may lead to increased costs to the schools. In the school context, the Establishment and Free Exercise Clauses are not divided by a wall of separation. Rather, they must co-exist to honor the beliefs and rights of all.

Notes

1. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).
2. *Lanner v. Wimmer*, 662 F.2d 1349, 1352 (10th Cir. 1981).
3. *Id.*
4. U.S. Const., amend. I.
5. *Williams v. Vidmar*, 367 F.Supp.2d 1265, 1276 (N.D.Cal. 2005), quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008).
6. *Id.* at 1030-31.
7. 20 U.S.C.A. § 4071(a).
8. 20 U.S.C.A. § 4071(c).
9. *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).
10. 20 U.S.C.A. § 4071(b).
11. *Mergens*, *supra* note 9 at 245.
12. *Id.* at 247.
13. *Id.* at 250.
14. Lawsuits about the Equal Access Act generally involve Christian groups or gay rights groups. Although the latter are outside the scope of this article, see, e.g., *Straights & Gays for Equality v. Osseo Area Schs.—Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cty.*, 602 F.Supp.2d 1233 (M.D.Fl. 2009).
15. *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F.Supp.2d 1291, 1293 (C.D.Cal. 2008).
16. *Id.* at 1298.
17. *Id.* At 1299.
18. *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 223 (3d Cir. 2003).
19. *Id.* at 224.
20. *Prince v. Jacoby*, 303 F.3d 1074, 1085-87 (9th Cir. 2002).
21. 20 U.S.C.A. § 4071(d)(3).
22. *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, 561 F.Supp.2d 1078, 1086, 1093 (D.Ariz. 2008).
23. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 848 (2d Cir. 1996).
24. *Id.*
25. *Id.* at 851.
26. *Id.* at 858.
27. *Id.* at 859.
28. *Id.* at 862.
29. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 638 (9th Cir. 2008), *rev'd in part on other grounds by Los Angeles Cty. v. Humpbries*, 131 S.Ct. 447 (2010).
30. *Id.* at 644.
31. *Id.* at 647.
32. *Every Nation Campus Ministries v. Achtenberg*, 597 F.Supp.2d 1075 (S.D.Cal. 2009).
33. *Id.* at 1093.
34. *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971 (2010).
35. *Id.* at 2980, 2989.
36. *Id.* at 2993-94.
37. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
38. *Corder v. Lewis Palmer Sch. Dist. 38*, 566 F.3d 1219, 1226 (10th Cir. 2009), quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).
39. *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1545 (7th Cir. 1996).
40. *Tinker*, *supra* note 37 at 504.
41. *Id.* at 513, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).
42. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
43. *Id.* at 273.
44. Schools also may control lewd or obscene speech under *Fraser*, *supra* note 38, but normally that is not an issue with religious speech.
45. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (test based on *United States v. O'Brien*, 391 U.S. 367 (1968)).
46. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 928, 934 (10th Cir. 2002).

47. Ed.gov, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools" (Feb. 7, 2003), available at www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

48. *Id.*

49. *Sherman v. Koch*, 623 F.3d 501, 518-19 (7th Cir. 2010). *See Croft v. Governor*, 562 F.3d 735 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).

50. *Hollomon v. Harland*, 370 F.3d 1252, 1286-87 (11th Cir. 2004).

51. *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) (emphasis original).

52. *Cf. Borden v. Sch. Dist. of Twsp. of E. Brunswick*, 523 F.3d 153, 165 (3d Circuit 2008); *Chandler*, *supra* note 52 at 1317 (other student-led invocations).

53. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

54. *Id.* at 304.

55. *Id.* at 313.

56. *Herdahl v. Pontotoc Cty. Sch. Dist.*, 933 F.Supp. 582, 588-89 (N.D.Miss. 1996).

57. *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F.Supp.2d 98, 114 (D.Mass. 2003).

58. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 743 (5th Cir. 2009).

59. *Id.* at 747-48; *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2009) (same result).

60. *Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008).

61. *Raker v. Frederick Cty. Pub. Schs.*, 470 F.Supp.2d 634 (W.D.Va. 2007).

62. *M.B. v. Liverpool Cent. Sch. Dist.*, 487 F.Supp.2d 117 (N.D.N.Y. 2007).

63. *Id.* at 138.

64. *Slotterback v. Interboro Sch. Dist.*, 766 F.Supp. 280, 296 (E.D.Pa. 1991).

65. *C.H. v. Bridgeton Bd. of Educ.*, 2010 WL 1644612 (D.N.J. 2010) (not published).

66. *Id.* at *8.

67. *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008). *See also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001); *Jacobs v. Clark Cty. Sch. Dist.*, 373 F.Supp.2d 1162 (D.Nev. 2005).

68. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659 (S.D.Tex. 1997).

69. *Menora v. Illinois High Sch. Ass'n*, 683 F.2d 1030 (7th Cir. 1982).

70. *Betenbauch v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010). Note that this case applied the Texas Religious Freedom Restoration Act, which required strict scrutiny.

71. *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008); *Nixon v. Northern Local Sch. Dist.*, 383 F.Supp.2d 965 (S.D. Ohio 2005).

72. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *cert. granted and judgment vacated by* 549 U.S. 1262 (2007).

73. *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F.Supp.2d 1195 (S.D.Iowa 2002).

74. *Lee v. Weisman*, 505 U.S. 577 (1992).

75. *Corder*, *supra* note 38 at 1239. *See also Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000); *Deveney v. Bd. of Educ.*, 231 F.Supp.2d 483 (S.D.W.Va. 2002).

76. *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).

77. *Bear v. Fleming*, 714 F.Supp.2d 927, 990 (D.S.D. 2010).

78. *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005).

79. *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

80. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

81. *Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997).

82. *Id.* at 557.

83. *Nichol v. Arin Intermediate Unit 28*, 268 F.Supp.2d 536, 550 (W.D.Penn. 2003).

84. *Johnson v. Poway Unified Sch. Dist.*, 2010 WL 768856 at *7 (S.D.Cal., 2010), *quoting Tinker*, *supra* note 37 at 506.

85. *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 777 (10th Cir. 1991). Although *Roberts*, *supra* note 1 at 1057, uses the test in *Tinker*, *supra* note 37, the holding in *Roberts* is primarily about the Establishment Clause. The *Hazelwood* analysis is more likely to be used.

86. *Miles*, *supra* note 85 at 777.

87. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (seminal employee speech case).

88. *See Lee v. York County Sch. Div.*, 484 F.3d 687, 694 (4th Cir. 2007).

89. *Id.* at 767.

90. *Id.* at 778.

91. *Johnson*, *supra* note 84 at *9, *quoting Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007).

92. *Miles*, *supra* note 85 at 776 ("an ordinary classroom . . . is not a public forum").

93. *Williams*, *supra* note 5 at 1272.

94. *Id.* at 1273.

95. *Fleming*, *supra* note 46 at 928. *But see Kiesinger v. Mexico Acad. & Cent. Sch.*, 427 F.Supp.2d 182 (N.D.N.Y. 2006) (individuals could purchase brick for school sidewalk with personally inscribed message, but school removed bricks with certain religious messages after threat of a lawsuit; court held that although there were legitimate pedagogical interests in controlling the limited public forum, there was no compelling state interest that would justify viewpoint discrimination).

96. *Downs v. Los Angeles Unif. Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

97. *Johnson*, *supra* note 84 at *9.

98. *Id.* at *11-12.

99. *Lee*, *supra* note 88 at 694.

100. *Nichol*, *supra* note 83 at 557.

101. *Lee*, *supra* note 88 at 694-95.

102. *Id.* at 697.

103. *Id.* at 696.

104. *Id.* at 699-700.

105. *LeVake v. Indep. Sch. Dist. #656*, 625 N.W.2d 502, 509 (Minn.App. 2001).

106. *Nichol*, *supra* note 83 at 557.

107. *Id.* at 560.

108. *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999).

109. *Warnock v. Archer*, 380 F.3d 1076, 1080 (8th Cir. 2004).

110. *Daugherty v. Vanguard Charter Sch.*, 116 F.Supp.2d 897, 910 (W.D.Mich. 2000).

111. *Downing v. West Haven Bd. of Ed.*, 162 F.Supp.2d 19 (E.D.Conn. 2001).

112. *Marchi*, *supra* note 108 at 477.

113. *Roberts*, *supra* note 1 at 1057.

114. *Id.* at 1061.

115. *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 815 (8th Cir. 2004).

116. *Id.* at 814.

117. Office of the Attorney General, Commonwealth of Va., Opinion No. 05-044 (July 11, 2005).

118. *Borden*, *supra* note 52.

119. *Id.* at 171 (note that this case defines public concern differently from *Nichol*, *supra* note 83 at 557, and ignores the free exercise aspect of the speech).

120. *Id.* at 171.

121. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995).

122. *Doe v. Indian River Sch. Dist.*, 685 F.Supp.2d 524, 534 (D.Del. 2010). *But see John Doe #2 v. Tangipahoa Sch. Bd.*, 631 F.Supp.2d 823, 838 (E.D.La. 2009) (noting that the Sixth Circuit has declined to apply the legislative prayer exception and applies a traditional Establishment Clause school prayer analysis).

123. *Id.* at 534, *quoting Marsh v. Chambers*, 463 U.S. 783 (1983).

124. *Id.* at 539.

125. *Id.* at 542.

126. *John Doe #2*, *supra* note 122 at 836.
127. *Pounds v. Katy Indep. Sch. Dist.*, 730 F.Supp.2d 636 (S.D.Tex. 2010).
128. *Id.* at 644-45.
129. *Id.* at 639.
130. *Lister v. Defense Logistics Agency*, 482 F.Supp.2d 1003 (S.D.Ohio 2007).
131. *Doe v. Wilson County Sch. Sys.*, 564 F.Supp.2d 766, 796 (M.D.Tenn. 2008).
132. *Daugherty*, *supra* note 110 at 907-08.
133. *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).
134. *Id.* at 107.
135. *Id.* at 118.
136. *Child Evangelism Fellowship (CEF) of New Jersey, Inc. v. Stafford Township Sch. Dist.*, 233 F.Supp.2d 647, 659 (D.N.J. 2002).
137. The forum typically would be a limited public forum, rather than a public forum, because it would not be open to all expression or all groups. For instance, a school might allow announcements from nonprofit organizations promoting activities of interest to students.
138. *CEF of Minnesota v. Elk River Area Sch. Dist. #728*, 599 F.Supp.2d 1136, 1141 (D.Minn. 2009).
139. *Hills v. Scottsdale Unified Sch. Dist., No. 48*, 329 F.3d 1044 (9th Cir. 2003).
140. *CEF of New Jersey*, *supra* note 136 at 661.
141. *Hills*, *supra* note 139 at 1052-53.
142. *Doe*, *supra* note 131 at 798.
143. *Hills*, *supra* note 139 at 1052. An earlier Ninth Circuit case held that the district had to give access to a Good News Club to meet, but could not require teachers to hand out the club's brochure and parental permission slips, though they did so for other non-school groups, which may not be a consistent holding to *Hills*. *Culbertson v. Oakridge Sch. Dist.*, 258 F.3d 1061, 1065 (9th Cir. 2001).
144. *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 422 (6th Cir. 2004).
145. *Id.*
146. *Scalise v. Boy Scouts of America*, 692 N.W.2d 858, 870-71 (Mich.App. 2005); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 8 F.3d 1160 (7th Cir. 1993) (same result).
147. *CEF of Maryland v. Montgomery County Pub. Sch.*, 373 F.3d 589, 593 (4th Cir. 2004).
148. *Id.* at 597.
149. *Id.* at 599.
150. *CEF of Maryland v. Montgomery County Pub. Sch.*, 457 F.3d 376, 379-80 (4th Cir. 2006).
151. *Id.* at 383.
152. *Id.* at 387-88.
153. *CEF of New Jersey, Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 519 (3d Cir. 2004).
154. *Id.* at 527.
155. *Id.* at 527-28.
156. *Id.* at 534.
157. *Id.* at 536.
158. *Berger v. Rennselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993).
159. *Roark v. South Iron R-1 Sch. Dist.*, 573 F.3d 556, 560 (8th Cir. 2009).
160. *Id.*
161. *Jabr v. Rapides Parish Sch. Bd.*, 171 F.Supp.2d 653 (W.D.La. 2001).
162. *Roe v. Tangipahoa Parish Sch. Bd.*, 2008 WL 1820420 (E.D.La. 2008). *See Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998).
163. *Id.* at 285.
164. *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F.Supp.2d 1099, 1113-14 (E.D.Tex. 2002).
165. School Ministries, "Bible Education Released Time," available at www.releasedtime.org/sitert/besthtml/best_history.htm.
166. Dean, "Catch and Release," *World Magazine* (Nov. 21, 2009).
167. CRS § 22-33-104(2)(a).
168. *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding New York released time program); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (striking down Illinois released time program because religious instruction occurred in public school classrooms and the force of the public school was used to promote the program). *See also Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975); *Holt v. Thompson*, 225 N.W.2d 678 (Wis. 1975).
169. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981), *citing Lemon*, *supra* note 5.
170. *Id.* at 1353.
171. *Id.* at 1357.
172. *Id.* at 1358.
173. *Id.* at 1359.
174. *Pierce v. Sullivan West Central Sch. Dist.*, 379 F.3d 56, 60 (2d Cir. 2004).
175. *Zorach*, *supra* note 168 at 308-09. The Court commented: We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.
176. *Doe v. Shenandoah County Sch. Bd.*, 737 F.Supp. 913 (W.D.Va. 1990).
177. *Moore v. Bd. of Educ.*, 212 N.E. 2d 833 (Ohio App. 1965).
178. *Doe*, *supra* note 176 at 918.
179. *Zorach*, *supra* note 168 at 311.
180. *Lanner*, *supra* note 169 at 1358-59.
181. *Compare id.* at 1361 (granting elective credit permitted), *with Moss v. Spartanburg County Sch. Dist. No. 7*, 676 F.Supp.2d 452 (D.S.C. 2009) (court denied motion to dismiss because challenge to elective school credits was sufficient to plead that the released time program violated the Establishment Clause; no determination of the issue).
182. *Lanner*, *supra* note 169 at 1360-61 (holding that school officials could not determine whether released time courses were "mainly denominational," as such an evaluation impermissibly entangled government actors in religion). ■