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## Public Schools and Religious Freedom



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# Religious Liberty for Public School Teachers: Rights and Limitations

BY JESSICA ROSS, ESQ. AND THERESA SIDEBOTHAM, ESQ.

Public school teachers face challenging circumstances when expressing their faith at work. On one hand, they are government employees, and the government may not endorse religion because of the Establishment Clause. But teachers are also private citizens with religious freedom protected by the Free Speech and Free Exercise Clauses. Teachers who want to live out their faith in their chosen vocation must understand how their government and private roles interact.

## Limits on Teachers' Rights to Express Their Faith

Teachers have the right, like any other citizen, to live out their faith; however, the unique public school environment creates some restrictions. Because religious exercise involves speech or expressive conduct, free speech principles often apply.

When deciding whether a teacher's speech is protected, most courts look at whether the teacher was speaking on a matter of public concern.<sup>1</sup> If so, then the school needs a good reason for treating the teacher differently from any other member of the general public. For instance, the government may show that restrictions on teacher speech are necessary for the school to operate efficiently and effectively. This balancing test weighs the school's interest as an employer and educator with the teacher's interest to speak freely on important societal issues.

Courts are currently split on whether teacher speech, particularly in higher education, is further restricted under a U.S. Supreme Court case called *Garcetti v. Cebellos*.<sup>2</sup> Under that case, before a court even gets to the balancing test, it first asks whether the teacher was speaking as part of his or her official duties. If so, he or she is not speaking as a citizen but rather as a government employee, and the Free Speech Clause provides no protection.<sup>3</sup> In cases where *Garcetti* applies, teacher free speech may be restricted even more than it would be otherwise.

While public schools have discretionary power over teacher speech and conduct, they are also employers and must follow Title VII of the Civil Rights Act of 1964.<sup>4</sup> Under this law, they are obligated to provide reasonable accommodations for their employees' religious practice unless doing so would cause an undue

hardship.<sup>5</sup> Teachers should work collaboratively with administrators if they need a religious accommodation to a workplace rule.

## Teacher Free Exercise: Practical Examples

Think of a continuum for how teachers can express their faith at work. Generally, an activity or speech that looks more like government endorsement of religion rather than personal expression will be restricted. The continuum is further complicated by the age of the students involved. Primary school teachers are more restricted than college professors because of their young audience. Practically, it may help to see how courts have actually decided some of these cases.

### Classroom Behavior

Restrictions on a teacher's religious freedom are most severe in the classroom. Courts have consistently held that teachers may not provide devotional religious instruction or practice their religion in certain ways in the classroom, such as follows:

- Leading prayers or encouraging prayer during a moment of silence;<sup>6</sup>
- Reading Bible passages or teaching Biblical theology in a devotional manner;<sup>7</sup> or
- Displaying religious posters or other similar material in the classroom.<sup>8</sup>

The Supreme Court has held that public schools may teach students about the Bible as long as the teaching is "presented objectively as part of a secular program of education."<sup>9</sup> As the Supreme Court noted in its 1963 "school prayer" decision:

[I]t 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.<sup>10</sup>

Teachers may include religious materials in their lessons if the material has a legitimate and objective reason for being included. For example, an art teacher may need to explain the Biblical story behind a great religious painting being studied in class. A literature teacher might wish to expose students to the beauty of the Psalms.





A world history teacher might wish to familiarize students with the Ten Commandments or other primary source material from the Bible because of its importance in history.

In doing so, the teacher must be clear that the purpose of using the religious materials is to educate the students rather than to inculcate religious beliefs. Teachers should be scrupulous in their respect for students' (and students' families') own religious beliefs, or lack thereof. An excellent resource for understanding the legal parameters for including religious materials in the curriculum is a short booklet entitled *The Bible and Public Schools: A First Amendment Guide*.<sup>11</sup>

If school officials question inclusion of the materials, the teacher should be prepared to explain the curricular benefits of including the material, as well as the legal permissibility of using the material. But if his or her supervisors continue to oppose use of the materials, the teacher must defer to their decision. The school district, not the teacher, has the final say about the use of curricular materials.

Teachers should be able to answer student-initiated questions about their personal viewpoints—although some courts limit even this.<sup>12</sup> While teachers' abilities to express their own personal religious beliefs at school is limited, they hold an important role in

safeguarding their students' religious liberty. Students have fairly broad constitutional rights to express their religious points of view at school, and teachers can make sure they don't get shut down.

### Private Expression

In some jurisdictions, teachers can engage in personal religious practices—wearing religious jewelry, praying silently, or reading the Bible—even on school grounds.<sup>13</sup> When a teacher conducts these activities around students, however, that freedom may be limited. For example, a teacher may be able to read her Bible during her lunch break in the teachers' lounge but not during classroom silent reading time.<sup>14</sup>

School personnel are also limited in participating in student-led prayer or other religious exercises because it may seem that the school is endorsing or encouraging the practice.<sup>15</sup> Some courts take this idea to the outermost limit. Recently, a federal appeals court held that a high school football coach had no First Amendment right to take a knee to silently pray alone on the football field after a game, on the grounds that he was speaking as a public employee, not a private citizen.<sup>16</sup> While some courts have said that a school can restrict coaches from praying with students, this decision against personal, silent religious practice is quite extreme.

## Extracurricular Activities

Teachers can supervise a student-led religious group, so long as the teacher does not participate directly.<sup>17</sup> A teacher can lead or teach in non-school sponsored after-school religious clubs attended by students in some jurisdictions. One case held that a teacher was allowed to teach an after-school religious children's club held at her school because she was operating on her own time.<sup>18</sup>

## With Other Teachers/Staff

Teachers have more freedom to witness to or discuss religion with fellow staff members than with students.<sup>19</sup> There is less of a concern that the government is endorsing religion through the teacher's private conversations with adult peers. Yet even this may have limits. If a fellow teacher indicates the religious discussion is unwelcome, the discussion should stop. Administrators must be aware of their positions of power and avoid improper pressure on staff regarding religious issues.

## Behavior Outside of School

When acting on their own time outside of school, teachers and other public school employees enjoy most of the freedoms of ordinary citizens. Teachers can freely attend religious services, lead Bible studies, and teach Sunday School—even if their students also attend.<sup>20</sup> Teachers should be cautious about public remarks on controversial topics, particularly posts on the internet. There are many cases of teachers being fired or suspended for what they post on their personal social media profiles, and the law is somewhat unsettled in this developing area.<sup>21</sup>

## Teacher Free Exercise: A Balancing Act

Public school teachers' rights may be limited, but teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>22</sup> Teachers have religious rights, but they should learn their own district's rules and generally try to operate within them. Materials on the Christian Legal Society website are intended to help teachers understand the law regarding religion in the public schools.<sup>23</sup> By understanding the different principles that apply, people of faith can strike the right balance while staying true to their core convictions.







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## END NOTES

- 1 See *Pickering v. Bd. of Educ. of Twp.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983).
- 2 See, e.g., *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) (discussing split).
- 3 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
- 4 See 42 U.S.C. § 2000e-2.
- 5 See *id.*; see also 29 C.F.R. § 1605.2.
- 6 See, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962).
- 7 See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963).
- 8 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011); see also *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007).
- 9 *Sch. Dist. of Abington Twp.*, 374 U.S. at 225.
- 10 *Id.*
- 11 The Bible Literacy Project, Inc., and First Amendment Center, *The Bible and Public Schools: A First Amendment Guide*, 1999, at <https://www.clsreligiousfreedom.org/teacherresources>.
- 12 Compare *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991) (if a student asked about his religious views, a professor could “fairly answer the question”), with *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (school can require teacher to refrain from discussing personal religious beliefs at school).
- 13 See, e.g., *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536 (W.D. Pa. 2003) (instructional assistant permitted to wear cross necklace).
- 14 *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (teacher modeling silent reading could not read his Bible during elementary class’s silent reading time).
- 15 See, e.g., *Borden v. Sch. Dist. of Twp. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008).
- 16 *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 830 (9th Cir. 2017).
- 17 See, e.g., *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990).
- 18 *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807 (8th Cir. 2004).
- 19 See U.S. Dep’t of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, [https://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (last visited July 31, 2018).
- 20 See, e.g., *id.*
- 21 See, e.g., Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N. C. L. Rev. 1597-1642 (2012).
- 22 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
- 23 Several excellent resources regarding religion in the public schools can be found on Christian Legal Society’s website at <https://www.clsreligiousfreedom.org/teacherresources>.



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