PREFACE

How do educational leaders respond to the legal challenges facing their organizations in a highly litigious society? How do they ensure that their organizations are achieving their mission without unduly restricting the constitutional rights and personal freedoms of their students and staff? How do leaders know when they are operating within the law? How can they build and foster an organizational culture that places high value on the personal rights and uniqueness of each individual? These are issues this book addresses. The courts expect educational leaders to possess the necessary knowledge and skill that will enable them to meet legal challenges that impact their organizations.

School Law and the Public Schools: A Practical Guide for Educational Leaders, Sixth Edition, is based on the premise that educational leaders and policy makers must be knowledgeable of the law that governs the operation and conduct of their organizations as they face a highly litigious society. Increasingly, educational leaders need to exercise discretion in making sound and legally defensible decisions that affect students and school personnel under their authority. They need to guide the development and execution of sound and well-developed policies, rules, and regulations governing many aspects of their operation. Educational leaders must ensure that they possess the legal knowledge necessary to accomplish these important administrative tasks successfully.

NEW TO THIS EDITION

The basic intent of this sixth edition is to better equip educational leaders and policy makers with relevant and timely information that will assist them in meeting legal challenges while minimizing legal exposure as they execute their defined duties and responsibilities in a highly litigious environment. The goal of the sixth edition is to provide comprehensive and practical information regarding relevant and emerging contemporary issues that impact the organization and administration of public schools. An additional goal is to better prepare educators at all levels to perform their professional duties within the boundaries of the U.S. Constitution, statutory law, case law, and school district policies. Information included in this edition will focus on practices that are legally defensible as well as those that are not. Knowledge of existing and emerging legal issues will enable educational leaders to exercise discretion in addressing the myriad legal issues they face on a daily basis. Increasingly, school leaders are expected to operate within the context of well-defined policies, rules, and regulations governing all aspect of their organizations. This edition will ensure that they possess the legal knowledge necessary to accomplish their essential administrative tasks successfully. The sixth edition includes the following additions and revisions:

• New addition to chapter on legal framework to include searching case law and the trial process
  • Guidance in identifying and researching cases and a visual depiction of how the trial process works
  • Revised chapter on religion includes a discussion of prayer at legislative meetings, religious banners at football games, and legislation on acknowledging Christmas in schools
  • Includes an in-depth discussion of all issues relating to the Exercise Clause of the First Amendment
• Search and Social Media
  • Provides guidance regarding the extent to which school personnel may or may not search cell phones of students in public schools
• Use of electronic devices by students and teachers
  • Provides guidance regarding academic advantages of electronic devices in the classroom for instructional purposes
Preface

• Procedures for Evaluating Threats
  • Includes steps that should be taken to properly assess and respond to threats in schools

• Legal Liability and Hazing

• Zero Tolerance and Due Process
  • Discusses the issue regarding the fairness of zero tolerance policies in the context of Fourteenth Amendment applications

• English Language Learners and Special Education
  • Examines the issues surrounding misclassification of English learners into special education based on English language deficiencies

• Multitiered System of Support
  • Discusses the tiered learning system as a mechanism to improve learning outcomes for all students including students with special needs

• Liability at Bus Stops
  • Discusses the legal limits of school or district liability regarding student activities at bus stops

• School Liability and Technology Use by Students
  • Provides guidance for school personnel regarding potential liability for negligence in failing to monitor how students use technology in schools

• Digitizing Student Records
  • Discusses advantages and precautions that should be exercised by school personnel regarding digitization of student records and student privacy issues

• Student Complaints and FERPA
  • Discusses the extent to which students are covered under FERPA when they register complaints regarding their teachers

• Teachers’ Use of Facebook and Other Social Media
  • Discusses the dangers associated with teachers’ use of Facebook and other social media and the inherent problems associated with communicating with students

• Transgender Teachers
  • Discusses the rights afforded transgender teachers and how they should be treated in schools

• Unwed Pregnant Teachers
  • Discusses the rights of pregnant teachers and the privileges they should be afforded in schools

• Genetic Information Discrimination Act
  • Defines actions that are discriminatory with respect to requesting or requiring disclosure of genetic information regarding a prospective employee or his/her family members when rendering an employment decision

• Vague Interviews
  • Provides guidance regarding the appropriateness or inappropriateness of certain inquiries during the interview process

• Retention of Personnel Data
  • Provides insight relative to the length of time in which certain personnel records should be maintained for legal purposes

• School Leader Evaluation
  • Provides guidance with respect to factors that might be considered in assessing leadership effectiveness

• Teaching Evaluation
  • Provides information regarding myriad factors to be considered in assessing teacher effectiveness
Preface

• Documentation of Teacher Performance
  • Discusses methods of recording vital information regarding teaching performance as a means of assisting teachers in improving performance

• Insubordination Steps
  • Provides a systematic and legally defensible process for determining whether a teacher’s conduct constitutes insubordination.

• Documentation of Teacher Misconduct
  • Discusses legal steps that should be considered in determining teacher misconduct

• McKinney-Vento Homeless Assistance Act
  • Provides guidance regarding the liberty interests of homeless students to attend public schools and the support systems that are required to ensure that they are provided an opportunity to succeed.

• Common Core Standards
  • Provides an overview of Common Core Standards to include objectives, outcomes, and opposition regarding these standards

This book is organized and written in a style that facilitates ease of reading even for individuals who have little or no legal background. Significant court cases are carefully selected to address issues that are most relevant to effective practice. The text begins with an in-depth focused discussion of the development of the U.S. Constitution and major legal issues, followed by relevant constitutional, statutory, and case law. Legal citations are used to support and enhance the discussion of these issues, and a section on searching case law and the trial process also is included. Legal references supporting the topics under discussion are found on each page, thus enabling the reader to easily ascertain the legal sources of authority related to those particular topics.

One unique and salient feature of this text is its focus on the development of administrative guides that relate to major issues discussed in each chapter. These guides provide leaders with information pertinent to directing their day-to-day decisions and actions as they encounter a wide array of legal challenges within their organizations. No attempt was made to review or include a significant number of state statutes or interpretations because variations are numerous from state to state. The primary focus of this text involves legal sources or developments that have significant implications for effective educational leadership throughout public schools in the United States. A significant component of the book is the inclusion of case studies at the end of each chapter that provide meaningful application exercises for educational leaders, thus allowing them to make sound and legally defensible decisions.

The book concludes with appendices that include selected amendments of the U.S. Constitution, as well as an expanded glossary of important legal terms to assist the reader and provide relevance to the body of the text. School Law and the Public Schools, Sixth Edition, provides a practical and useful resource guide for educational leaders and is aimed at increasing their knowledge and awareness of the complex legal issues that impact their organizations. It will enable them to more effectively perform their legal duties and meet the requirements of reasonableness as they move their organization toward their mission.

The Instructor’s Manual with Test Items is available online to adopters. Please contact your local Pearson representative for access.

ACKNOWLEDGMENTS

I would like to express my heartfelt appreciation to my administrative assistant, Carol Brown, for the countless hours spent preparing this document. Her energy, enthusiasm, encouragement, and support far exceeded my expectations. For her untiring efforts, I am eternally grateful.
Preface

I would also like to express my appreciation to my wife, Lorene, and my children, Kimberly, Jarvis, and Nathalie, for their love, support, and encouragement during the writing of this text. Their support provided me inspiration to persevere through the completion of this project.

I express gratitude to my daughter, Nathalie, an attorney, for her editorial research and technical assistance, which aided me greatly in the production of this book.

I would also like to thank the following reviewers for their time and input:
Brett Geier, University of South Florida; Susan Sostak, Loyola University Chicago; Joe Flora, University of South Carolina; Terry McDaniel, Indiana State University, and Richard “Kent” Murray, The Citadel.

Last, I express appreciation to my administrative team, friends, and colleagues for their support and encouragement during the writing of this sixth edition.

To my staff, colleagues, and family, I am immensely grateful.

— N.L.E.
Chapter 1
Legal Framework Affecting Public Schools

SOURCES OF LAW
Public schools as governmental agencies must operate within the boundaries of law at the local, state, and federal levels. Therefore, school personnel are expected to perform their prescribed duties within a framework of law. A number of legal sources affect the administration and operation of schools.

Bill of Rights and the Fourteenth Amendment
The Bill of Rights represents the primary source of individual rights and freedoms under the U.S. Constitution. The first ten amendments to the Constitution are viewed as fundamental liberties of free people because they place restrictions on the government’s powers to intrude on the fundamental rights of all citizens. These restrictions simply mean that the government cannot exercise certain powers in relationship to free people. For example, the government cannot pass laws prohibiting the freedom of speech. Consequently, citizens may speak freely within the boundaries of the Constitution without undue interference by the government. At its inception, the Bill of Rights limited only the federal government’s powers and not those of state government, which meant that each state relied on its own bill of rights to limit state powers.

However, this changed with the adoption in 1868 of the Fourteenth Amendment, which guarantees that due process of law and fundamental fairness are applied to the states. The Fourteenth Amendment stipulates, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Fourteenth Amendment provisions are considered federal law and are enforced by state or federal courts operating within their proper jurisdictions.

Before the adoption of the Fourteenth Amendment, very few controls were placed on state governments if they failed to abide by their own bills of rights. Relief could be sought only in the state courts without any certainty that these courts would enforce their own states’ bills of rights. Federal courts had no authority to enforce a state bill of rights that was solely under the jurisdiction of state courts. By virtue of the Fourteenth Amendment, that authority is now vested in the federal courts.

Along with due process and equal protection provisions, the most formidable freedoms contained in the Bill of Rights include freedom of speech, press, assembly, and religion as well as freedom from unreasonable searches and protection against self-incrimination. Thus, the first ten amendments now apply to encroachment by state government. Because public schools are
agents of the state, they are subject to the provisions of the Bill of Rights, which means that school officials must recognize and respect the constitutional rights of students and school personnel. Failure to do so will result in infringement of constitutionally protected rights and possible legal challenges through the courts.

The Federal Constitution

The Constitution of the United States is the basic law of the land. It provides a framework of law in which orderly governmental processes operate. The Constitution thus becomes the primary source of law. All statutes enacted at the federal, state, and local levels as well as state constitutions, local regulations, and ordinances are subordinate to the Constitution.

The U.S. Constitution is distinguishable in its provision to protect the fundamental rights of all citizens of the United States. Inherent among these rights are those involving personal, property, and political freedoms. Although the Constitution does not make reference to education, it impacts the operation and management of schools, particularly with respect to amendments, which protect the individual rights of students, faculty, and staff.

One salient feature of the Constitution is the provision that calls for the separation of powers involving the executive, judicial, and legislative branches of government. The precept of separated powers provides each branch with the proper checks and balances on the powers of other branches.

Key Amendments

Several amendments to the U.S. Constitution have a direct bearing on the operation of public schools, namely the following:

The **First Amendment** addresses basic personal freedoms of students and school personnel involving speech, press, assembly, and religion.

The **Fourth Amendment** addresses rights to privacy and protects students and school personnel from unreasonable intrusion into their person or property.

The **Fifth Amendment** provides protection against self-incrimination in cases when the individual’s life, liberty, or property is in jeopardy.

The **Eighth Amendment** does not directly apply to school discipline but has been referenced by parents and students in cases involving corporal punishment where there is an allegation of cruel and unusual punishment by school personnel. The intent of the Eighth Amendment is to protect individuals against cruel and unusual punishment involving those who have committed criminal offenses.

The **Tenth Amendment** reserves education as a state function, thus placing the primary responsibility for public schools on individual states.

The **Fourteenth Amendment** addresses the due process rights of students and school personnel to ensure that equal protection under the laws and fundamental fairness occur in matters involving deprivation of liberty and property.

State Constitutions

Based on the Tenth Amendment to the U.S. Constitution, powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively. Because education is not mentioned in the Tenth Amendment, it is left to states to control. Therefore, state constitutions represent the basic source of law for individual states and generally require legislative bodies to perform various functions, including establishing systems of public education. They prescribe funding and operational schemes for public schools. State constitutions also restrict the powers that legislative bodies may exercise.

State constitutions often address the same subject matter found in the U.S. Constitution, such as due process, individual rights and freedoms, and separation of church and state.
constitutions may exceed coverage granted by the U.S. Constitution but may not fail to meet the basic requirements of the Constitution or contradict it in any manner. Thus, a state statute may be in direct conflict with both federal and state constitutions or may violate one and be in compliance with the other. In all cases, federal and state constitutions prevail.

Statutes

Statutes represent acts of the legislative branch of government. The word statute is derived from the Latin term statutum, meaning “it is decided.” Statutes are the most abundant source of law affecting public schools. School district policy, rules, and regulations generally are based on statutory law. Because education is considered a state function by virtue of the Tenth Amendment, courts tend to support the view that state legislatures should exercise power over public schools. It is only when statutes conflict with the U.S. Constitution, federal law, or state constitutions that a challenge is brought to the courts. In short, statutes are always subject to review by the judicial branch of government to determine their constitutionality. Statutes represent the most effective means of developing new law or changing old laws.

State legislators grant local school boards the authority to adopt and enforce reasonable rules and regulations necessary for the operation and management of schools. When challenged, school officials must be able to demonstrate that a legitimate state interest is met by enforcing a particular rule or regulation, especially in cases where individual freedoms are restricted.

Court or Case Law

Case law is generally reflected in judge-made or common law, as distinguished from statutory law. Common law consists of the judgments, opinions, and decisions of courts adopting and enforcing preceding usages and customs. Frequently, case law relies on past court decisions, which are called precedents. This practice is derived from the rule of law known as stare decisis, a Latin term meaning “let the decision stand.” This doctrine requires courts to observe legal precedents established in previous cases in the same jurisdictions in making future decisions involving the same or similar subject matter and factual circumstances. Although courts generally rely on precedent, they are not absolutely bound by it in rendering a decision. Factual circumstances may be sufficiently different to warrant a different decision, even when the subject matter is similar. Moreover, the rationale used in reaching the decision may not be viewed as applicable to the particular case under review. Federal courts, in their rulings, have contributed to a significant body of case law, which affects the development of educational policies governing the administration and operation of public schools.

Case law is sometimes viewed as unsettled law because occasionally courts render conflicting rulings within their jurisdictions. Thus, a ruling by a federal, district, or appellate court only affects educational policymakers in that particular jurisdiction. Consequently, what is actually practiced, accepted, and enforced varies by time and place regardless of precedent. For example, if a Florida court sets a precedent, schools in Connecticut are not bound by the decision because they are not located in the same jurisdiction. The U.S. Supreme Court is the single court whose decisions affect the organization and administration of public schools across the nation. Even so, in many instances state and federal appellate decisions are not followed due, in large measure, to the fact that the Supreme Court has no ability to hear every conceivable issue relating to schools.

Researching Case Law

A case is a written decision issued by a court. Federal and state courts publish their decisions in reporters. These reporters are organized chronologically. This system provides a methodology to research case law relevant to student conduct as well as permissible teacher and administrative action. The most effective means of understanding the context of a case and its application is to
read the case in its entirety. The facts and the holding (the court’s decision) of the case provide key information that will be helpful in understanding the genesis of the law in a particular area.

There are free legal research sites such as Lexis-Nexis, Westlaw, and FindLaw. Each of these sites provides an opportunity to conduct case research by citation, case name, and subject matter. These sites typically provide access to post-1990 court opinions with the exception of United States Supreme Court opinions, which typically are accessible to the public. Access to any case law prior to this time may require a paid membership. Access to these sites provides an opportunity to read and gain a better understanding of the law on any particular subject matter of interest.

**Locating a Case by Citation.** *New Jersey v. TLO* will be used as an example in the following discussion to illustrate how to conduct case research.

A standard three-part citation indicates where to find the case:

<table>
<thead>
<tr>
<th>Volume Number</th>
<th>Reporter</th>
<th>Page Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>469</td>
<td>US</td>
<td>325</td>
</tr>
</tbody>
</table>

Simply entering this citation into a search box will enable the researcher to easily locate any case that is being researched. Another research option is locating the case style (name of court, case number, and names of plaintiffs and defendants) or case name.

**Finding a Case by Case Name.** Enter in the find by name or case name search box:

*New Jersey v. TLO*

Case names are organized by party names. The plaintiff is listed first and the defendant second. Entering the style or name of a case will also facilitate the location of the case desired.

**Locating a Case by Topic.** The *New Jersey v. TLO* decision centered on searches in public schools. Because this is a Supreme Court decision, a simple word search of “public school searches and United States Supreme Court” will reveal the decisions of the Supreme Court relating to public school searches.

**State Agencies**

State legislatures in virtually all states have created administrative agencies to execute various laws and policies governing public schools. One of these agencies typically includes state boards of education. The legislature generally prescribes the duties and scope of authority delegated to state boards. Members of each state board of education are either appointed by the governor or elected by popular vote by citizens within the state. Conflicts frequently arise with state boards of education based on the separation of the executive, legislative, and judicial branches of government. The legislature is prohibited from delegating its powers to an administrative agency.

For example, the legislature in the state of Illinois commanded the superintendent of public instruction to prepare specifications for minimum requirements to conserve the health and safety of students. The specifications developed by the superintendent of instruction were challenged by the board of education under a claim that they were unconstitutional. The board sought injunctive relief against their enforcement. The circuit court granted relief. The superintendent appealed the decision. The Supreme Court of Illinois held that the statute was a proper delegation of administrative authority to the superintendent. However, the superintendent’s specifications, which preempted the entire field of school safety and purported to strike down all local codes and ordinances relating to school safety, were invalid. Only the legislature had the power to preempt local codes and ordinances regarding school safety.

**State Boards of Education.** The state board of education may exercise broad or limited powers, based on legislative authorization. Public schools generally are placed under the control
of the state board of education. In this capacity, the state board of education determines, to some degree, the direction of education in its state and also functions as a planning and evaluative body that functions immediately below the legislature. Through delegated power, the board may develop policies covering an array of legal issues such as, among others, health and safety, minimum requirements for teacher licensure, graduation requirements for students, rights of students with disabilities, and student disciplinary practices. The courts generally recognize the board’s authority based on state statute to regulate student and school personnel conduct as long as its actions are not arbitrary or capricious.

In general, most state boards have six legal powers in common. They (1) establish certification standards for teachers and administrators, (2) establish high school graduation requirements, (3) establish state testing programs, (4) establish standards for accreditation of school districts and teacher and administrator preparation programs, (5) review and approve the budget of the state education agency, and (6) develop rules and regulations for the administration of state programs.*

State boards of education may not abrogate responsibilities delegated to them by state statutes. The courts are reluctant to impose their judgment regarding decisions that are made within the state board of education’s designated authority unless there is evidence of arbitrary and capricious acts or a violation of an individual’s constitutional rights. In such cases, the courts will intervene to determine whether the evidence supports constitutional violations. In reviewing the action of an administrative board, one court has held that it will go no further than to determine (1) whether the board acted within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will rather than its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination in question.2

In addition to state boards of education, each state has a state department of education, which is headed by a state superintendent or chief state school officer (CSSO). State departments are the professional arm of the CSSO. These departments consist of specialists in virtually all areas relating to education. They provide consultation and advice to local school districts, the state board, and the CSSO. State departments generally are depositories for massive amounts of research data and strategic reports collected from local school districts. Much of these data consists of reports necessary to ensure that the state is in compliance with federal and state mandates and to facilitate education planning at the state and local levels. Among other duties, the state department of education conducts research on school practices, develops short- and long-term plans for educational outcomes, enforces state and federal law, evaluates districts for accreditation, evaluates statewide testing programs, and monitors compliance of state-approved curriculum.

Local School Boards

Local school boards impact education policy and the administration of public schools. The school board exercises general supervision over the schools within its district. However, its broader role involves the formulation of school district policy. Consequently, it is viewed as a policy-making body. School district policy is generally based on state statute. If consistent with state and federal laws, state and federal constitutions, and court rulings, school district policies are considered to be legally enforceable.

The local school board has a responsibility to formulate a vision that defines the future it envisions for the district. Certain goals, objectives, and measurable outcomes may be included as integral components of the board’s vision.

The vision of the school district is closely aligned with the district’s mission. The mission generally defines the basic purpose of the district and the core values embraced by the district as

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it moves toward achieving its mission. Virtually all districts have formulated standards of performance for both students and teachers that in general are closely aligned with state standards related to No Child Left Behind provisions. Certain performance measures are established to determine the extent to which specified standards are met. The board has a leading responsibility for formulating goals that contribute to student achievement and continuous improvement of all educational programs. The board typically functions as the appellate body involving faculty, staff, and students when legal issues emerge involving recommended sanctions such as suspensions, expulsions, and dismissal.

The board is responsible for the formulation of policies, rules, and regulations that provide direction for the administration and operation of schools. The board is viewed as a corporate body. Therefore, individual board members have no power beyond the power that is granted to the full board by the legislature. Consequently, individual school board members are not free to formulate policy or to act independently of the board as a whole. School board members are considered public school officers and are granted powers by the legislature that are essential to the execution of their duties and responsibilities. The board is typically advised by its attorney and strives to act within legal boundaries established by the U.S. Constitution, state constitutions, state and federal statutes, and relevant court decisions affecting the school district.

The size of school boards varies and is generally determined by state statute. The number of school board members is typically odd to prevent a pattern of tie votes. Board members are either appointed or elected. School boards generally consist of five to seven members, although some districts may have fewer than five or more than seven.

One very significant duty of the school board involves the selection of its superintendent, unless the board operates in one of the few states where the superintendent is elected by citizens within the district. The relationship between the superintendent and the school board is best described as a legislative–executive one within which the board formulates policy and the superintendent executes policy. The board delegates certain duties and responsibilities and holds the superintendent accountable for performing them. The board evaluates the effectiveness of its policies and may revise or delete existing policies or formulate new ones based on district needs.

The board also adopts an annual budget covering personnel, instruction, student services, transportation, facilities, equipment, and materials needed to meet desired educational outcomes. Professional and support personnel are employed by the board based on the superintendent’s recommendation. If the board has defensible grounds, it has the latitude to accept or reject personnel recommendations. Terms and conditions, salary schedules, and overall staffing and evaluation policies are determined by the board.

Because the board is accountable to the public, it is expected to operate in an open and transparent manner. Thus, school board meetings are viewed as open meetings, as virtually all states have enacted “sunshine laws” that allow citizens to attend open meetings and be informed of actions taken by the board. Citizens may request an opportunity to be included on the board’s agenda during a regular board meeting in order to speak on issues that are of concern to themselves or the community at large. Citizens may also access school board minutes because they are considered public records.

School boards may hold executive sessions to discuss sensitive matters such as employee discipline, contract issues, or attorney–board consultation. Only board members may attend these meetings. The intent of these meetings is to protect the confidentiality of sensitive information or potentially damaging information that may injure a person’s good name or reputation. Consequently, all items discussed during executive sessions are confidential and should not be divulged by board members.

School boards are expected to be accountable to the general public and specifically to their communities for what occurs in the district regarding school safety, student achievement, teaching performance, financial management, and other areas of importance. In recent years, the No Child Left Behind Act has changed the culture of schools through the enactment of initiatives aimed at an assessment of year-to-year student progress based on statewide assessment measures.
Chapter 1 • Legal Framework Affecting Public Schools

The school board has a leading responsibility for establishing high quality standards and system priorities centered on enhancing student achievement. Not only is it expected to establish high-quality performance standards, but it also has a responsibility to create an environment and climate within which excellent teaching and learning occur. Therefore, the board must ensure to the greatest degree possible that proper resources are provided to achieve desired district outcomes and that funds are administered responsibly.

**SCHOOL BOARD POLICIES.** School board policies represent a basic source of law for school personnel as reflected in the rules and regulations governing the total operation of schools. School board policies are legally defensible as long as they do not conflict with the federal or state constitutions, federal or state statutes, or case law. Once these legal requirements are met, the school board as the delegated policy-making body at the local level may not violate its own policies. A school board is legally required to adhere to its own policies. Failure to do so may result in legal challenges by those adversely affected by the board’s actions.

**THE U.S. SYSTEM OF COURTS**

The judicial system consists of federal and state courts. The organization of the courts at both levels is essentially the same: trial courts, intermediate courts of appeal, and the highest court, which is the U.S. Supreme Court. State constitutions usually prescribe the powers of state courts as well as their jurisdiction. Irrespective of the level, courts are limited only to cases or legal conflicts presented to them for resolution. Courts cannot take it upon themselves to decide on the constitutionality of a statute or a policy unless a suit is brought challenging the legality of that particular statute or policy.

The courts usually perform three types of judicial functions when they are called on to act. They (1) settle controversies through applying basic principles of law to specific factual circumstances, (2) interpret legislative enactments, and (3) determine the constitutionality of legislative or administrative mandates. When applying principles of law to specific situations, the courts may find that principles of law are vague or ambiguous. In such cases, the courts must rely on legal precedent for direction.

In interpreting statutes, the courts, through their analogies and rulings, may actually affect the definition of the legislation by assigning meaning to it. When determining the constitutionality of statutes, courts make the presumption that such statutes are constitutional. Consequently, those who challenge the legality of the statute must assume the burden of proof to demonstrate otherwise. The Supreme Court in Florida addressed this issue as follows:

"We have held that legislative acts carry such a strong presumption of validity that they should be held constitutional if there is any reasonable theory to that end…Moreover, unconstitutionality must appear beyond all reasonable doubt before an act is condemned. If a statute can be interpreted in two different ways, one by which it will be constitutional, courts will adopt the constitutional interpretation." 

**Federal Courts**

Federal courts typically deal with cases involving federal or constitutional issues ("federal questions") or cases in which the parties are residents of different states ("diversity of citizenship"). The federal court system includes district courts, appellate courts, and the Supreme Court. There are ninety-five federal district courts in the United States. At least one federal court is found in each state; larger states, such as New York and California, have as many as four. Federal courts usually hear cases between citizens of different states and cases involving litigation of federal statutes.

Federal appellate courts are represented by circuit courts of appeal. The thirteen federal circuit courts include eleven with geographic jurisdiction over a number of states and territories,
one for the District of Columbia, and one involving three specialized federal courts. Table 1.1 and Figure 1.1 identify the geographic areas associated with each circuit.

Many judges sit on the various courts of appeals; for example, the Sixth Circuit Court of Appeals has fourteen judges and eight “senior” judges available to sit in panels of three judges. The primary function of the appellate court is to review the proceedings of lower courts to determine whether errors of law (as opposed to facts) were committed, such as procedural irregularities, constitutional misinterpretations, or inappropriate application of rules of evidence. Panels of

### TABLE 1.1 Jurisdiction of Federal Circuit Courts of Appeal

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Jurisdiction</th>
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<tbody>
<tr>
<td>1st</td>
<td>Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island</td>
</tr>
<tr>
<td>2nd</td>
<td>Connecticut, New York, Vermont</td>
</tr>
<tr>
<td>3rd</td>
<td>Delaware, New Jersey, Pennsylvania, Virgin Islands</td>
</tr>
<tr>
<td>4th</td>
<td>Maryland, North Carolina, South Carolina, Virginia, West Virginia</td>
</tr>
<tr>
<td>5th</td>
<td>Louisiana, Mississippi, Texas</td>
</tr>
<tr>
<td>6th</td>
<td>Kentucky, Ohio, Michigan, Tennessee</td>
</tr>
<tr>
<td>7th</td>
<td>Illinois, Indiana, Wisconsin</td>
</tr>
<tr>
<td>8th</td>
<td>Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota</td>
</tr>
<tr>
<td>9th</td>
<td>Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington</td>
</tr>
<tr>
<td>10th</td>
<td>Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming</td>
</tr>
<tr>
<td>11th</td>
<td>Alabama, Florida, Georgia</td>
</tr>
<tr>
<td>DC</td>
<td>Washington, DC</td>
</tr>
<tr>
<td>Federal</td>
<td>Washington, DC (specialized courts)</td>
</tr>
</tbody>
</table>


### FIGURE 1.1 U.S. Courts: The Federal Judiciary

judges for appellate courts hear oral arguments from the appellant and the appellee, examine written arguments, vote, and render a ruling. The appellate court may also, based on its finding, remand the case to be retried by the lower court.

**State Courts**

State courts are the part of each state’s judicial system with the responsibility of hearing cases involving issues related to state constitutional law, state statutes, and common law. Many education cases are heard in state courts because they do not involve a federal question. The structure of state courts is similar to those found in the federal courts: courts of general jurisdiction, courts of special jurisdiction, courts of limited jurisdiction, and appellate courts. The names of these courts vary among the fifty states, but all states have at least three to four tiers of courts.

State statutes generally prescribe the types of cases that must be heard by the various courts within a state. Discretionary jurisdiction involves cases in which a party files a petition to the state supreme court seeking redress. It is then left to the court to use its discretion (or discretionary power) in deciding to accept or reject the case. It is important to understand that state courts play a vital role in addressing many issues involving the administration of public schools.

** COURTS OF GENERAL JURISDICTION.** Courts of general jurisdiction are often referred to as district or circuit courts. Their jurisdiction covers most cases except those held for special courts. In many instances, decisions of these courts may be appealed to intermediate appellate courts or even to the state supreme court. Areas adjudicated by these courts include civil, criminal, traffic, and juvenile issues.

** COURTS OF SPECIAL JURISDICTION.** Courts of special jurisdiction hear legal disputes on special matters. They are generally referred to as trial courts with limited jurisdiction and may be called municipal, justice of the peace, probate, small claims, or traffic court.

**INTERMEDIATE APPELLATE COURTS.** Intermediate appellate courts have emerged over the past three decades to hear appeals from trial courts or certain state agencies. Their primary role involves reviewing proceedings from trial courts to determine whether substantive or procedural errors occurred in applying the law. In a sense, their duties are similar to those of the highest court within the state; however, the primary difference between the two courts is discretion: The intermediate court has less discretion in accepting cases than does the highest or state supreme court. Many, but not all, of the cases heard by the intermediate courts are mandatory.

**APPELLATE COURTS.** Appellate courts represent the highest courts within the state. They are considered courts of last resort. In forty-four states, these are referred to as the state supreme courts. These courts have some discretion in accepting cases, but they must hear mandatory cases based on appeal and decide on the merits of each.

See Figure 1.2, which depicts the progression of a case through the U.S. court system.

**THE TRIAL PROCESS.** There are five essential stages to a trial. These stages are as follows:

- **Pleadings stage** involves a complaint filed by the plaintiff and an answer to the complaint by the defendant. The defendant may also file a motion rather than an answer requesting that the court dismiss the case, or may require the plaintiff to further clarify the intent of the case.

- **Pre-trial stage** is designed to seek resolution of issues that can be resolved prior to the trial. Issues are identified that are in dispute and must be resolved at trial versus issues that are not in dispute.
FIGURE 1.2  Case Progression Through the Court System
*A writ of certiorari is a discretionary review granted or denied by the U.S. Supreme Court.

Motions are used by attorneys to request that the court initiate a specific action by issuing an order to resolve a dispute. Summary judgment is an example, where the court decides to settle a dispute or dispose of a case promptly without conducting full legal proceedings because no issue, material, or facts exist that support a cause of action.

Discovery stage entails gathering evidence by attorneys from the plaintiff and defendant, which involves inspecting relevant documentation and interviewing individuals who are aware of the circumstances leading to the lawsuit. Depositions are taken and interrogatories also are initiated.

Trial stage consists of jury selection. If a jury is involved (as opposed to a bench trial) from a pool of potential jurors, jurors are questioned to determine their suitability to serve impartially. The judge and counsel for both the plaintiff and defendant are involved in this process. When a jury is seated, opening statements are made by the plaintiff’s and defendant’s attorneys. Closing arguments are also made by each attorney when the trial concludes. The judge provides specific instructions to the jury regarding the evaluation of the case prior to its deliberations.
Post-trial stage consists of a verdict rendered by the jury and a ruling by the court. The party, either plaintiff or defendant, may appeal for the case to be heard by a higher court. Steps involving pre-trial, discovery, and motions may be completed concurrently or interchangeably depending upon the circumstances within the case. See Figure 1.3 for components of the trial progression process.

ANALYSIS OF AN APPELLATE COURT OPINION

Court proceedings are concluded with a written opinion setting forth the decision of the court on an issue under review by the court. These opinions consist of a set of components designed to facilitate an understanding of the court’s ruling. The most common elements include the name of the case, the year in which the case was decided by the court, the appellant’s contention, the appellee’s defense, the procedure by which the case reached the court, the facts giving rise to the case, the ruling of the court, the court’s rationale for the ruling, and the final disposition on the issue.

Case (Citation)

Cases are usually named for the parties involved in the controversy. The party initiating the suit at the trial court level is referred to as the plaintiff. The party against whom the suit or action is brought is called the defendant. The plaintiff’s name comes first, followed by the defendant’s
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(e.g., Baker v. Owen). If the case is appealed, the party initiating the appeal who was not supported at the first level becomes the **appellant**, and the other party becomes the **appellee**. In this instance, the appellant is listed first and the appellee last (e.g., Owen v. Baker). Even though it may take as long as several years before all legal remedies are exhausted in a particular case, the year in the case citation indicates the time when the decision was rendered.

**Procedure**

The initiator of the suit (plaintiff) files a complaint seeking **relief** by the courts for alleged improper actions taken by the defendant or failure on the defendant’s part to meet certain legal standards. In either case, the plaintiff contends that an indefensible act has been attributed to the defendant. The party against whom a complaint is filed responds to the complaint with a rationale as to why certain actions were or were not taken. The defendant attempts to justify actions taken in regard to the plaintiff. In appellate decisions, an explanation may be given as to how the case reached the appellate level. An appeal or a petition for a **writ of certiorari** is the most common means used to bring a case to a higher court level. At the U.S. Supreme Court level and in some state courts of appeals, the writ of certiorari is used to remove a case from a lower court to a higher court for review.

**Facts**

The facts of a case describe the specific details leading to the conflict or controversy that resulted in the case reaching the court. The facts describe the nature of the conflict as determined by the evidence presented during the actual proceeding. The facts are at issue only at the lower trial court level, not at the appeals stage. Appellate courts apply the law to the facts as determined by the trial.

**Ruling and Justification**

The ruling of the court, made manifest in the form of the written decision or opinion of the court, represents the court’s response to the issue presented for its review. The ruling is usually accompanied by a justification detailing the basis on which the ruling was made. The ruling usually includes statements covering primary facts and the major conclusions reached by the courts. **Stare decisis**—the following of precedents—is an important component of all court decisions.

**Disposition**

The **disposition** follows the ruling of the case that determines whether the plaintiff or the defendant was supported by the courts in the dispute. Once the victor is determined, the court reaches a conclusion and orders that some action be taken consistent with its ruling. If the plaintiff wins, the court will prescribe a **remedy** for the **damages** suffered by the plaintiff. It may be in the form of an order compelling the defendant to compensate the plaintiff for damages or an **injunction** prohibiting the defendant from continuing a certain practice deemed to be unjust. If the defendant is upheld, the case may be dismissed with an order that the plaintiff pay court fees and other legal fees associated with the case. In some instances, the case may be passed to an appellate court to determine the proper remedy. The appellate court may uphold the lower court decision, reverse the lower court decision, or modify the decision in some manner. The court may also remand the case back to the lower court for further proceedings based on its review of the case.

**THE U.S. SUPREME COURT**

The U.S. Supreme Court is the highest court in the land. Unlike lower courts, there is no appeal beyond the decision of this court. The Supreme Court’s ruling can be overturned only by an amendment to the U.S. Constitution. Nine justices, including a chief justice, comprise the High Court. To avoid political infringement, they are appointed to life terms.
Interestingly, the Supreme Court first convened in New York in 1790 and adjourned because it had nothing to do. It decided only fifty-six cases over a ten-year period, with very few of the cases having any real significance. Cases reach the Supreme Court primarily in two ways: on appeal and by writ of certiorari. The Supreme Court’s review occurs in the following manner:

On Appeal (A Review by Right)

From State Courts
1. Where a state court has held a federal statute or treaty provision unconstitutional
2. Where a state court has upheld a state law or state constitutional provision arguably in conflict with the U.S. Constitution, laws, or treaties

From Federal Courts of Appeals
1. Where a federal law or treaty is held unconstitutional
2. Where a state law or state constitutional provision is held invalid because it conflicts with a federal law, treaty, or constitutional provision

From Federal District Courts (direct appeal to Supreme Court)
1. Where a federal statute having a criminal penalty is held unconstitutional
2. Where judgment has been rendered to enforce antitrust laws, the Interstate Commerce Act, or Title II of the Federal Communications Act
3. Where a three-judge district court grants or denies an injunction restraining enforcement of state statutes or federal statutes, or orders of certain federal agencies

On Certiorari (A Discretionary Review Granted or Denied by Vote of the Supreme Court)

From State Courts
1. In cases involving federal questions where the decision supported a federal claim made under federal law or constitutional provisions

From Federal Courts of Appeals
1. Where a decision interpreted or applied the Constitution or various federal laws or
2. Where state laws or state constitutional provisions have been challenged in conflict with federal law where the court of appeals upheld the state provisions.4

Decisions reached by the Supreme Court are group decisions that presumably produce stability. Justices work collectively but independently to arrive at decisions. The High Court meets for thirty-six weeks, commencing on the first Monday of each October and ending during the week of July 7. The justices spend their time listening to lawyers’ arguments, discussing court business, writing or studying opinions, and reading briefs submitted by attorneys. Each justice works six days a week, eight to ten hours each day. Court is open four days each week from Monday through Thursday. During this time, the justices listen four hours each day to oral arguments. Each case is given only one hour to argue its position, with the plaintiff and the defendant receiving thirty minutes each to make their points. The Court recesses for two weeks to allow the justices to perform their important duties relating to the business of the Court.

U.S. Supreme Court Ritual

On Fridays at 11:00 A.M., the justices meet in a conference room (which is lined with books from floor to ceiling at a marble fireplace). They meet under a painting of the great chief justice John James Marshall, the fourth chief justice of the United States, and shake hands, showing harmony of aims. Justices are called to chamber by a buzzer five minutes before 11:00 A.M.

Seated at the head of the table is the chief justice; directly across from him at the other end of the table sits the Senior Associate Justice. The rest sit on either side of the table according to rank in seniority, descending in seniority away from the chief justice. The most recently
appointed justice serves as a “messenger,” carrying messages in and out of the conference room. Discussion of issues passes from justice to justice according to seniority. After discussion, a vote is called—four votes bring a case to the Court; five votes dispose of it. If a justice disqualifies himself or herself and the vote is four to four, the lower court decision stands. Justices vote in reverse order, from least senior to most senior.

After voting, the case is assigned to a justice to write an opinion. Writing is assigned by the chief justice if he voted with the majority; if not, then the next most senior justice performs this task. When the opinion is written, it is disseminated to other justices for their concurrence (concurring opinion) or dissention (dissenting opinion); they also look for weaknesses. Frequently, the opinion is rewritten by the original author, sometimes as many as twenty-five times. It is then filed in Open Court.

U.S. Supreme Court Decisions

U.S. Supreme Court decisions include three citations that are often referred to as parallel citations, which means that the same case can be found in three different sets of documents. These sources are as follows:

1. United States Reporter (U.S.), the official reports of Supreme Court decisions
2. Supreme Court Reporter (Sup. Ct. or S.Ct.), published by West Publishing Company
3. United States Supreme Court Reporter (L. Ed.), published by Lawyers Cooperative Publishing Company

Parallel citations are illustrated in the following example: Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1992). In the first citation, 369 refers to the volume in the United States Reporter; 186 refers to the page where the case can be found. In the second citation, 82 refers to the volume of the Supreme Court Reporter; 691 refers to the page where the case can be found. In the third citation, 7 refers to the Lawyer’s Edition volume, 2d refers to the second edition, and 633 refers to the page where the case can be found. The 1992 inside parentheses denotes the year in which the decision was rendered. Any of these three sources may be used to locate a U.S. Supreme Court case.

LEGAL INFORMATION RETRIEVAL SYSTEMS

The two primary legal information retrieval systems are Westlaw and LexisNexis. Both are important sources for legal research and tools for legal professionals and practitioners.

Westlaw cites case law, state and federal statutes, and administrative codes as well as law journal reviews that may be found at the Westlaw legal research service. Westlaw contains more than 40,000 databases. These databases are indexed to the West Key Number System, which is Westlaw’s Master Classification System of law in the United States. The National Reporter System is published by West and is the most prominent set of reporters. West publishes the following reporters containing decisions of the federal courts: (1) Supreme Court Reporter includes decisions of the United States Supreme Court, (2) Federal Reporter includes decisions of the various courts of appeals, and (3) Federal Supplement includes decisions of the various district courts. In addition to the West reporters, United States Reports is an official reporter for the U.S. Supreme Court. The Westlaw website may be accessed at http://web2.westlaw.com.

LexisNexis provides legal content from newspapers, magazines, and legal documents. This database contains public records, unpublished opinions, and legal news. LexisNexis services are found on two websites. One website, Lexis.com, is referenced for legal research, whereas Nexis.com is intended for corporations; local, state, and federal government; and professionals in academia. The Lexis database contains all current U.S. statutes and laws, nearly all published case opinions, and virtually all publicly available unpublished opinions.
Chapter 1 • Legal Framework Affecting Public Schools

**Administrative Guide**

**Legal Framework**

1. The U.S. Constitution is the fundamental law of the land. State laws and school district policies or administrative practices may not conflict with any constitutional amendments.

2. When developing school policies, the U.S. Constitution should be considered the primary source of law. Statutes should be considered the second primary source of law if they are consistent with the Constitution. If not, case law becomes the second primary source, with statutes becoming the third primary source.

3. Because education is a state function, state statutes create local school districts and establish all requirements that school districts must meet. Statutes are subject to review by the judicial branch of government to determine their constitutionality.

4. With the exception of U.S. Supreme Court decisions, school leaders must adhere to court rulings affecting their respective states and circuits for administrative guidance.

5. Local school boards as policy-making bodies are responsible for formulating districtwide school policy.

6. The courts will not permit local school boards to violate their own policies once they are determined to be legally defensible.

**Resources**

Supreme Court decisions may be located on the following websites:

- westlaw.com
- loislaw.com
- lexisnexus.com
- findlaw.com
- supremecourt.gov

**CASE STUDY**

**Local School Board Policies**

Review your local school board policies with a focus on statutory law:

- Are your local policies consistent with state and federal law?
- Do they meet current and future needs?
- When were they last revised?
- Do you see policy voids—areas that should be covered, but are not covered?
- What recommendations would you make if you were provided an opportunity to improve these policies for the following?
  a. Relevance
  b. Legal defensibility
  c. Appropriateness based on need
  d. Codification

**Endnotes**

1. This definition of case may be located at: [www.lawschool.cornell.edu/library/whatwedolibrary/researchguides/basics.cfm#11](http://www.lawschool.cornell.edu/library/whatwedolibrary/researchguides/basics.cfm#11)


Chapter 2

Religion and the Public Schools

The Fourteenth Amendment, a key component of the U.S. Constitution, focuses on the rights and privileges of citizens of the United States in the provision that states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Although the Fourteenth Amendment prohibited infringement on the rights of U.S. citizens, the Constitution as a whole made virtually no reference to religious liberties of U.S. citizens when it was ratified by the states. The only exception was a religious-test provision that prohibited states from imposing religious tests for federal offices. This provision became the last clause of Article VI of the Constitution. The omission of religious liberties in the Constitution was defended by James Madison, which led Thomas Jefferson to convince him that a religious provision was needed in the Bill of Rights. The uncertainty of whether religious rights were implied in the Constitution was sufficient to justify the need for a Bill of Rights protecting religious freedoms. Madison then introduced a series of proposals that included amendments aimed at preventing encroachment by government into the rights and liberties of all citizens. These proposals, presented to the House of Representatives, eventually became the Bill of Rights. Noticeable among these rights was the separation of church and state, which guarantees religious freedoms and prohibits the establishment of religion by the government.

Although religious freedoms are addressed in the Bill of Rights, conflicts involving church and state interactions have intensified over the past decade, as numerous challenges have been levied against public schools regarding certain questionable religious practices. Courts increasingly have been called on to determine the constitutional validity of these practices.

The tension between church and state issues relates to the requirement that the government maintain a neutral position toward religion. In 1879 in the landmark case Reynolds v. United States, the U.S. Supreme Court invoked Thomas Jefferson’s view that there should be a wall of separation between church and state.¹

The First Amendment serves as the basis for delineating certain individual religious rights and freedoms as well as governmental prohibitions regarding religion. The First Amendment to the U.S. Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Although the initial intent of the First Amendment prohibited Congress from making laws supporting religion or prohibiting individuals from exercising their religious rights, the U.S. Supreme Court, in a compelling decision, Cantwell v. Connecticut, held that this prohibition,
aimed at Congress, also applied to the states. The Fourteenth Amendment made the First Amendment applicable to state action, thus providing the same constitutional guarantees to citizens against state infringement of their religious rights by prohibiting the establishment of religious practices in public schools.

The First Amendment contains two essential clauses regarding religion: the Establishment Clause and the free exercise clause. The Establishment Clause prohibits the state from passing laws that aid a religion or show preference for one religion over another; the free exercise clause prohibits the state from interfering with individual religious freedoms. In a non–educational-related free exercise case involving Oregon’s Department of Human Services, Alfred Smith and Glen Black were dismissed from their jobs because they violated a term of employment by ingesting the drug peyote. The State of Oregon considered the controlled substance to be a hallucinogen as classified by the Federal Controlled Substances Act. Both respondents are members of the Native American Church, which uses peyote in a sacramental ritual. They applied for unemployment compensation through the state and were denied based on having lost employment through misconduct. The lower court held that peyote can be criminally prohibited. Both respondents appealed the state’s decision, relying on the free exercise clause of the First Amendment because the use of peyote was considered a religious ritual. The U.S. Supreme Court held that the free exercise clause of the First Amendment made applicable to the state does not prevent the State of Oregon from including a religiously inspired peyote use in its criminal prohibition of the drug. Therefore, the state may deny unemployment benefits to all users, including users of religious content. The High Court’s conclusion was that the respondents’ belief does not excuse them from acting lawfully as determined by a valid state law.

In an educational setting, the combined effect of the establishment and free exercise clauses compels public schools as state agencies to maintain a neutral position in their daily operations regarding religious matters. This means that the state can neither aid nor inhibit religion—it must adhere to the principle of neutrality. The intent of the Establishment Clause was clearly enunciated in the famous Everson case, in which the U.S. Supreme Court stated:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

Since the Cantwell decision, which held that the Fourteenth Amendment makes the First Amendment applicable to state action, the Establishment Clause has significant implications for the administration of public schools.

The Establishment Clause essentially raises concerns in instances where school personnel act as government officials. When school officials are not acting in this capacity, the Establishment Clause does not restrict their religious freedom. Freedom of speech, freedom of association, and freedom of religion protect school personnel just as they protect the religious activities of other citizens. The courts have used the Endorsement and Coercion Tests in some instances to gain a clearer interpretation of the Establishment Clause of the First Amendment. The Endorsement Test is typically relied on in cases where the government is engaged in activities involving free expression, as would be the case in situations regarding prayer at graduation exercises, religious symbols on government property, and religious content in school curricula. This test was advocated by Justice Sandra Day O’Connor when she raised the issue as to whether a particular government action amounts to an endorsement of religion. According to Justice O’Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that
the government is either endorsing or disapproving religion. Her concern grew out of the *Lynch v. Donnelly* case in which she suggested that the Establishment Clause prohibits the government from endorsing religion in any manner.\(^6\)

Under the Coercion Test, the government does not violate the Establishment Clause unless it provides direct aid to religion in a manner that would tend to establish a state church or it coerces people to support or participate in religion against their will. Under this test, the government would be allowed to erect religious symbols such as the Nativity Scene standing alone in a public school or other public building at Christmas. This test, however, is subject to varying interpretation, as was the case in *Lee v. Weisman* when Justices Kennedy and Scalia applied the same test and reached different results.\(^7\) The Coercion Test was a product of Justice Kennedy’s dissent in the *County of Allegheny v. ACLU* case that affects a person’s standing in a political community. His concern was whether a specific government action conveys a message to non-subscribers that they are outsiders, rather than full members of the political community, and a different message to subscribers that they are, in fact, insiders favored by the community. The Endorsement Test has on occasion been merged into the *Lemon* Test.\(^8\)

An interesting Establishment Clause decision was rendered when the U.S. Supreme Court let stand a decision by lower courts that a school district’s Islam program did not violate the Establishment Clause of the First Amendment. Prior to the Court’s order denying review, the U.S. Court of Appeals, Ninth Circuit, held that the program activities were not “overt religious exercises that raise Establishment Clause concerns.” The action was brought by two families who alleged that a middle school world history teacher asked them to choose Muslim names, learn prayers, simulate Muslim rituals, and engage in other role-playing exercises. The Ninth Circuit held that the school district and individual school employees were entitled to qualified immunity “because they did not violate any constitutional right, let alone a clearly established one.”\(^9\)

**SCHOOL-SPONSORED PRAYER**

The issue of prayer in public schools was addressed in a landmark case in the early 1960s by the U.S. Supreme Court. Prior to this time, prayer was routinely offered in public schools across the nation and generally supported by the courts. In spite of the landmark *Engle* decision banning prayer in public schools, school prayer continues to be challenged by Congress, state legislatures, and citizens as they persist in seeking creative ways to support prayer in the nation’s schools. For example, in 1996 a Republican congressman prepared an amendment to the Constitution designed to allow prayer in public schools. Representative Ernest Istook of Oklahoma indicated that he introduced a fifty-two-word “Religious Freedom Amendment” before Congress. Americans United for Separation of Church and State and other opponents were strongly opposed to such a measure and cited the harmful impact it would have for minority religions. This proposal represents just one example of congressional efforts to return prayer to public school. Prayer will continue to be a hotly contested issue, as it has quickly become one of the most highly debated topics in the United States today.

The U.S. Supreme Court first addressed prayer in public schools in the famous *Engle* case. A local board of education, acting under authority of a New York State law, ordered a brief non-denominational prayer to be said aloud by each class, in the presence of a teacher, at the beginning of each school day. The prayer had been composed by the state board of regents, which also had established the procedure for its recitation. Those children not wishing to pray were excused from this exercise. Parents brought action to challenge the constitutionality of both the state law that authorized the school district to mandate the use of prayer in public schools and the school district’s action of ordering recitation of this particular prayer. State encouragement of the regular recitation of prayer in the public school system is unconstitutional. The High Court held that the statute authorizing prayer recitation in the public schools is in direct violation of the First Amendment prohibition of a state establishment of religion.\(^10\)

In November 1996, the U.S. Supreme Court refused to revive a 1994 Mississippi statute that authorized voluntary student prayer at assemblies, sports events, and other school activities.
The High Court, without comment, allowed the lower court ruling to stand, which found the law unconstitutional and disallowed its implementation. Interestingly, the state did not, in its appeal to the Supreme Court, address the merits of the law itself but rather argued that the plaintiffs who challenged the law had no legal standing to do so. The state further argued that the law should not have been barred before it was actually enforced.

The lower court rejected both arguments, holding that the law violated the Establishment Clause of the First Amendment. This law was enacted by legislators after Bishop Knox, a high school principal, defied his superiors by permitting students to pray daily over the school’s public address system. As a consequence, Knox was fired by the school board, but this was later reduced to a suspension due to widespread public support for his actions. The Mississippi law called for nonsectarian and nonproselytizing student-initiated prayer and voluntary prayer during school activities and events. This practice was challenged by the American Civil Liberties Union. Both the district court and the U.S. Court of Appeals for the Fifth Circuit barred this practice on the grounds that the state was endorsing a religion. However, the lower court let stand a previous ruling that allowed student-led voluntary prayer at graduation ceremonies.

The Jones v. Clear Creek Independent School District case (discussed later in this chapter) represented a major step for school prayer proponents. The Fifth Circuit Court held that nonschool-sponsored, student-initiated prayer at graduation ceremonies did not offend the First Amendment prohibition regarding separation of church and state. The court viewed this practice as an exercise of students’ First Amendment rights to free speech, which did not create excessive entanglement between the church and state. Also, under the No Child Left Behind Act, school districts are required to certify in writing to their state agencies that no local district policy prevents or denies participation in constitutionally protected prayer in their public schools. This requirement is a condition to the receipt of NCLB funds.

SCHOOL-SPONSORED BIBLE READING

In 1963, the U.S. Supreme Court addressed the constitutionality of the practice of Bible reading in public schools. Two similar cases reached the Supreme Court during the same period of time. Abington School District v. Schempp involved a challenge regarding the validity of a Pennsylvania state statute that required the reading of ten verses of the Bible without comment at the opening of each school day. A companion case, Murray v. Curlett, challenged the actual practice of daily Bible reading in the schools of Baltimore, Maryland.

In the former case, several members of the Unitarian Church brought suit against the state to prohibit the state from enforcing the statute, as it was contrary to their religious beliefs and in violation of the First Amendment. The legislature attempted to defend its practice by making provisions for students to be excused with parental consent, if the practice offended them. The facts surrounding the Murray case were similar to those in the Schempp case, with the exception that no state statute was involved. The Supreme Court, in addressing both cases, ruled in an 8–1 decision that these Bible-reading practices were unconstitutional. The Court found these practices to be an advancement of religion and a clear violation of the separation of church and state. Justice Tom C. Clark, speaking for the majority, stated, “It is no defense to urge that the religious practices here may be a relatively minor encroachment on the First Amendment. The legislature attempted to defend its practice by making provisions for students to be excused with parental consent, if the practice offended them. The breach of neutrality that today is a trickling stream may all too soon become a raging torrent and, in the words of Madison, ‘It is proper to take alarm at the first experiment on our liberties.’”

The Supreme Court invoked the primary effect test to determine the impact of the statute and practice relating to each case. The primary effect test raises the question of whether the primary purpose of a law or practice has the effect of advancing or inhibiting religion and creating excessive entanglement between church and state. If the response to these questions is affirmative, the principle of neutrality has been breached and the act is considered to be an impermissible establishment of religion and a violation of the First Amendment. The Court did, however,
indicate in the *Schempp* case that the use of the Bible as a historical, literary, ethical, or philosophical document is permissible if a secular purpose is clearly served.

**SILENT PRAYER AND MEDITATION**

In recent years, attempts also have been made by state legislatures to support some form of state-sponsored voluntary prayer or meditation in public schools. Their efforts, however, have been largely unsuccessful. Numerous challenges to these types of statutes or practices have been led by opposing parents and citizens. Their challenges cover a full range of school activities, such as meditation and prayer at school-sponsored athletic events and graduation ceremonies, both of which are discussed later in this chapter.

The U.S. Supreme Court, in 1985, responded to the silent meditation and prayer issue by their ruling in *Wallace v. Jaffree*. The case was initiated in 1982 by the father of three elementary students who challenged the validity of two Alabama statutes: a 1981 statute that allowed a period of silence for “meditation or voluntary prayer,” and a 1982 statute authorizing teachers to lead “willing students” in a nonsectarian prayer composed by the state legislature. After a lower court found both statutes unconstitutional, the U.S. Supreme Court agreed to review only the portion of the lower court decision invalidating the 1981 statute that allowed “meditation or voluntary prayer.” The Court concluded that the intent of the Alabama legislature was to affirmatively reestablish prayer in the public schools. Inclusion of the words “or voluntary prayer” in the statute indicated that it had been enacted to convey state approval of a religious activity and violated the First Amendment’s Establishment Clause. However, student-initiated meditation that is not endorsed by school officials will not likely violate the Establishment Clause so long as the school does not set aside moments or prescribe that students should do so and no disruption to the educational process occurs. Student-initiated meditation is considered to be a form of mental reflection exercised by students. Students may meditate to relax before taking an exam or to relieve stress they experience during the school day.

**PRAYER AT SCHOOL EVENTS**

**Student-Led Prayer at Public School Events**

In a significant development, a federal court of appeals held that the U.S. Supreme Court ruling in the *Santa Fe* case does not prevent students in Alabama from discussing religion in public schools or praying publicly, as long as such activities are voluntary. This ruling is significant in that it represents the first interpretation by an appeals court of the Supreme Court’s *Santa Fe* decision. The recent circuit court ruling upholds its earlier decision permitting voluntary student-led prayer at public school events. In an earlier action, the Eleventh Circuit Court overturned a federal district court ruling that limited religious expression by students in DeKalb County, Alabama. The High Court asked the circuit court of appeals to reassess its decision based on its ruling in the *Santa Fe* case. The circuit court has stated in its most recent ruling that its decision was not in conflict with the High Court’s ruling in *Santa Fe* based on voluntary prayer in Alabama as contrasted with school-sanctioned, student-led prayer in Texas.

The Eleventh Circuit ruling was an outgrowth of a suit filed by the plaintiff Chandler in Alabama, who challenged the practice of offering prayer at school-sponsored events. He specifically objected to the practice of offering student-led prayer at athletic contests. The *Santa Fe* and *Chandler* cases appear to represent opposite sides of the same constitutional coin. For example, *Santa Fe* prohibits school-sponsored prayer, whereas *Chandler* condemns school censorship of prayer.

The Alabama case was initially filed by the American Civil Liberties Union on behalf of DeKalb County educator Michael Chandler, who challenged religious practices in public schools. The essence of the recent Eleventh Circuit ruling is that students do not shed their religious rights when they enter the schoolhouse door. The circuit court rejected the argument that prayer is forbidden by the First Amendment and supported the concept of free speech as guaranteed by the
First Amendment. What does this ruling really mean? For now, it means that any student-led group in the Eleventh Circuit may engage in voluntary prayer at school events. However, school personnel may not direct or supervise students who initiate religious expression.

It is interesting that in its ruling the appeals court adopted the High Court’s language in stating that nothing in the Constitution prohibits prayer. In the aftermath of the Eleventh Circuit ruling, what are the implications? Although this ruling affects only public schools in Alabama, Florida, and Georgia, it means that in those states, at least for now, school valedictorians, regardless of their belief or faith, may voluntarily pray at graduation ceremonies. It also allows student athletes to voluntarily engage in prayer at an athletic contest as long as school officials remain completely neutral. The Eleventh Circuit Court ruling reopens the debate on the legality of voluntary prayer by students at school-sponsored events. At issue are the free expression rights of students and the free exercise of their religious beliefs versus the Establishment Clause of the First Amendment. The First Amendment does not prohibit student-initiated private prayer. Based on the free exercise clause, students have the right to pray voluntarily any time and any place as long as it is private, strictly voluntary, and does not infringe on the rights of others. However, what is prohibited by the First Amendment is institutionally sponsored public prayer, which is an obvious violation of the Establishment Clause of the First Amendment. School officials should clearly understand this important distinction. This debate will likely persist as states continue to seek ways to address religion in public schools.

**Prayer at Athletic Contests**

Any type of school-sponsored prayer at athletic contests is deemed to be a violation of the First Amendment. The principle of neutrality mandates that public schools remain neutral in all matters relating to religion. For a number of years, a prevailing view was that prayer could be offered at athletic events as long as attendance was not compulsory. If attendance were voluntary, with prior knowledge that prayer would be offered, the offended person could simply avoid attending the event during the short time period in which prayer was to be offered. This view has not been accepted or supported by the courts in recent years, however. When public schools allow prayer to be offered at school events, they are placing the weight and influence of the school in support of a religious activity—an impermissible accommodation to religion and an obvious violation of the Establishment Clause. In recent years, courts have been fairly consistent in holding that prayer at football games and other athletic events violates the Establishment Clause. The following case reflects the sentiment of the courts regarding prayer at athletic events.

The *Jager* case arose in Georgia when a high school student complained to his principal about invocations at home football games. The student indicated that invocations were in conflict with his religious beliefs. Invocations were delivered, in large part, by Protestant clergy and had been practiced since 1947. The school had adopted an “equal access” plan that provided for the random selection of the invocation speaker by the student government.

The student filed suit against the district, seeking declaratory relief regarding the selection process and to prohibit the offering of invocations at home football games, as both practices were in violation of the First Amendment clause. The district court held for the school district. The student appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The court of appeals applied the *Lemon Test* to determine whether the invocations violated the Establishment Clause, based on a case involving aid to parochial schools, which will be discussed later in this chapter. According to the *Lemon Test*, for such practices to be held constitutional they need to have a secular purpose that neither advances nor inhibits religion, and they do not create excessive entanglement between the state and religion. The court held that the equal access plan had no secular purpose and did, in fact, promote religion in violation of the Establishment Clause, even though it did not involve excessive entanglement with religion. The circuit court reversed the district court’s decision, holding for the student. Based on the ruling in the *Jager* case, public school officials are well advised to refrain from the use of prayer at any school-sponsored event.
Prohibition of prayer at school events was given a major thrust when the U.S. Supreme Court in a 6–3 ruling in Santa Fe Independent School District v. Jane Doe banned student-led prayer at athletic contests, graduations, and other school-sponsored events. This ruling challenged previous lower court decisions permitting student-led prayer at graduation exercises in Jones v. Clear Creek Independent School District and Adler v. Duval County School Board in Florida (both discussed later in this chapter).

The U.S. Supreme Court decision stemmed from a case that was initiated in Santa Fe, Texas. Santa Fe’s high school implemented a policy that allowed the school’s student council chaplain to deliver a prayer over the public address system before each home varsity football game. This practice was challenged by respondents, Mormon and Catholic students, under the Establishment Clause of the First Amendment. Although the suit was pending, petitioner school districts adopted a different policy, which authorized two student elections: the first to determine whether invocations should be delivered at home games and the second to select the spokesperson to deliver them. After students held two elections authorizing such prayers and selecting a spokesperson, the district court entered an order modifying the policy to permit only nonsectarian, nonproselytizing prayer. Before the revised policy was implemented, the Fifth Circuit held that even as modified by the district, the policy was invalid because it violated the Establishment Clause of the First Amendment. The district argued, unpersuasively, that the messages delivered at football games are private student speech, not public speech. The district also argued that it did not coerce students to participate in religious observances.

In its ruling against the district, the U.S. Supreme Court stated, “The delivery of a message such as an invocation on school property at school sponsored events over the public address system by a speaker representing the student body under the supervision of school faculty based on school policy that implicitly encourages public prayer is not properly characterized as private speech.”

Various district and circuit courts rendered decisions that made it possible, prior to the recent U.S. Supreme Court ruling in the Santa Fe case, for states to decide if they wanted to support student-led prayer at graduation ceremonies. With this landmark Santa Fe ruling, states no longer may decide if voluntary student-initiated prayer may be offered at school events. According to the Court’s ruling, this is an impermissible act that violates the Establishment Clause of the First Amendment.

The High Court noted further that this case demonstrates that student views are not unanimous on the issue of prayer and that the Establishment Clause’s purpose is to remove debate over this kind of issue from governmental supervision and control. Although the ultimate choice of student speakers is attributable to students, the district’s decision to hold this constitutionally problematic election is clearly a choice attributed to the state. The argument by the district that no coercion is involved lacks merit. Students who participate in band, cheerleading, and football

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### Administrative Guide

**Prayer, Bible Reading, and Silent Meditation**

1. School-sponsored prayer is illegal and cannot be justified based on First Amendment prohibitions.
2. School-sponsored Bible reading in public school is an illegal activity. However, the Bible may be used as an instructional document to meet a secular purpose.
3. Silent meditation or any other type of devotional activity sanctioned by schools will not be supported by the courts.
4. Invocations at school-sponsored athletic activities violate the Establishment Clause of the First Amendment.
5. Private voluntary prayer by a student is permissible under the free exercise clause of the First Amendment.
are sometimes mandated to attend the athletic events for class credit. The Constitution demands that schools not force on students the difficult choice between whether to attend these games or risk facing a personally offensive religious ritual.

**VOLUNTARY PRAYER AT COMMENCEMENT EXERCISES**

As previously discussed, the constitutionality of prayer in public schools was seriously challenged in 1962 in the landmark *Engel v. Vitale* case in which the U.S. Supreme Court struck down the daily recitation of prayer over a school’s public address system. This landmark ruling banned prayer in any form in all school activities across the nation, based on a violation of the Establishment Clause of the First Amendment. In spite of this 1962 ruling, prayer at graduation ceremonies remains controversial.

For example, in a leading case in California, two taxpayers challenged the inclusion of religious invocations, benedictions, and other religious rituals at public high school graduation ceremonies. The invocations and benedictions were delivered by a Protestant minister or a Catholic priest, and all contained religious content. Summary judgment was granted on behalf of the taxpayers. The district appealed to the California Court of Appeals. The appellate court reversed the trial court’s ruling, which resulted in an appeal by the taxpayers to the California Supreme Court.

The court ruled that the practice of including religious invocations and benedictions at high school graduation ceremonies conveyed a powerful message that the district approves of the content of prayers offered and favored one religion over others. Because Christian denominations and non-Christians are many and varied, respect for all of these groups requires that the state not place its stamp of approval on any particular practice. The court further stipulated that public school graduation ceremonies involving prayer cannot be in harmony with the First Amendment’s command for neutrality. Therefore, the court of appeal’s judgment was reversed.²⁰

However, in another significant development, the U.S. Supreme Court let stand a stunning appeals court decision permitting student-initiated, student-led prayer at the Clear Creek Independent School District’s graduation ceremonies in Texas. In this decision, a federal appeals court ruled that a Texas school district’s policy of allowing each high school senior class to decide whether to offer student-initiated and student-led prayers at its graduation ceremony does not violate the First Amendment ban on the government’s establishment of religion.

Prayer at graduation ceremonies will continue to be a highly sensitive and controversial issue. During the last several years, courts have become increasingly active in responding to issues involving religion in public schools. School officials no longer enjoy the freedom they once had in planning school programs based solely on community values and standards. During the 1950s, religious controversies were not viewed primarily in terms of constitutional rights but rather in terms of community sentiment. However, the courts in recent years have abandoned community sentiment in favor of constitutionality. The Supreme Court’s position in *Jones v. Clear Creek Independent School District*, however, may provide an opportunity for communities to decide if they wish to have students assume the decision-making role. For now, at least, under certain conditions, voluntary student-led prayer at graduation ceremonies may be permissible. This is a major victory for proponents of prayer and perhaps an end to some of the controversy involving graduation ceremonies.

**Landmark Rulings**

Prior to the U.S. Supreme Court ruling in the *Santa Fe* case, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit ruled that the Clear Creek Independent School District’s policy did not violate the Establishment Clause of the First Amendment, nor did it conflict with the Supreme Court’s ruling in a 1992 Rhode Island case in which the High Court ruled that a
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Providence middle school principal violated the Establishment Clause by inviting a rabbi to deliver a prayer at a promotion ceremony.\textsuperscript{21} From the Court’s view, the administrator’s involvement suggested that the school was compelling students to participate in a religious exercise. However, the significance of the more recent Jones v. Clear Creek Independent School District case in Texas is that it creates a way to include prayer in graduation ceremonies without creating conflict with the Supreme Court’s previous decisions.

In the Rhode Island case (Lee v. Weisman), the three-part Establishment Clause test set forth in the Lemon case\textsuperscript{22} was used by the Supreme Court in ruling against the school district. Under the Lemon Test, a state practice that is challenged as unconstitutional must meet the criteria that it has a secular purpose, that its practices neither advance nor inhibit religion, and that it does not foster excessive entanglement between the state and religion. The student-initiated prayer in the Clear Creek case obviously met the Lemon Test, because the school played no role in offering the program and had no influence on the student who led the prayer.

The Clear Creek case reached the court in 1987 when the district’s policy was challenged in federal court by two students. The Federal District Court and the Fifth Circuit Court of Appeals upheld the district’s policy. The two students appealed to the U.S. Supreme Court, which vacated the Fifth Circuit Court’s original ruling and asked the court of appeals to reconsider the case in light of the Lee v. Weisman decision. The three-judge panel unanimously concluded that the Clear Creek policy allowing for student-initiated prayer did not fail the so-called Coercion Test set forth in the Rhode Island case. The Supreme Court declined to review the federal court of appeal’s decision, thus allowing student-initiated voluntary prayer at graduation ceremonies to be considered constitutionally permissible in the Fifth Circuit.\textsuperscript{23}

The clear distinction between these two cases lies in the difference between student-initiated and school-initiated prayers. When the school initiates a prayer, it creates excessive entanglement and advances religion, both of which violate the basic tenets of the First Amendment. When students voluntarily do so without involvement of the school, excessive entanglement is not evident.

Impact of Ruling

An earlier decision of the U.S. Supreme Court to let stand the U.S. Court of Appeals for the Fifth Circuit decision created opportunities for every state in the country to make an independent judgment regarding student-led graduation prayers, although the Fifth Circuit ruling affects only Texas, Louisiana, and Mississippi. In the Texas case, the district’s policy did not mandate prayer but merely made provisions for one should the seniors agree. The prayer, if supported by students, would be led by a student volunteer and be nonsectarian and nonproselytizing in nature. The reality of the Texas decision is that students could do what the school officials could not. It was not surprising to observe other states following the Texas decision.

In fact, a case arose in Florida during the same year in which the Clear Creek ruling was handed down by the Fifth Circuit Court. In Adler v. Duval County School Board, a Florida school board revised its graduation exercise policy by allowing the graduating class discretion to choose opening and closing remarks of two minutes or less to be delivered by a student volunteer selected by the class. The policy required that the student volunteer prepare the message without supervision or review by the school board. Senior classes at ten schools voted for prayer; seven other senior classes voted for a secular message or no message.

A group of graduating seniors and their parents filed suit against the board in the district court of Florida, alleging violation of their rights under the First Amendment. The court applied the familiar Lemon Test and held that the policy did not violate the Lemon criteria of having the primary effect of advancing religion or excessively entangling the school district with religion. Evidence revealed that the policy had a secular purpose of safeguarding the free speech rights of students participating and refraining from content-based regulations. The policy was held to be neutral, involving no coercion of students by school officials.\textsuperscript{24}
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These two cases may very well serve as precedents for other states as they approach the legalities of prayer at graduation ceremonies.

Student-initiated prayer is permissible based on free speech rights of students so long as it is not endorsed by school personnel and school personnel do not participate in the prayer. Designated school officials should not set aside a time period in which students participate or encourage students to engage in prayer. Student-initiated prayer should not disrupt the educational activities of the school. Student-initiated prayer may involve an individual student or a group of students. Examples include student-initiated prayer during club meetings; daily, weekly, or monthly prayer around the flagpole; before, during or after school; offering grace before a meal in the cafeteria; or silent prayer in class prior to taking an exam.

Significant challenges have emerged involving free speech rights of students in religious matters. The following represents recent litigation regarding religion and free speech:

1. The U.S. Supreme Court declined to hear an appeal regarding religious murals. In this case, the principal invited a student leadership class to organize a mural project to decorate panels that had been placed around an area of the school under renovation. Some students painted references to Jesus, prompting the principal to request that they be painted over due to disruption to the educational process. One student’s mother sued on her daughter’s behalf, alleging that painting over the mural amounted to censorship and subjected her daughter to ridicule based on her religious beliefs. The federal district court and subsequently the U.S. Court of Appeals for the Eleventh Circuit held that the principal had editorial control over the murals because they were school-sponsored speech that could be considered a part of the curriculum.25

2. An Ohio federal district court held that school officials violated a student’s free speech right when they prohibited him from wearing a T-shirt that expressed his religious views on sensitive social issues such as abortion and homosexuality.26

3. A California district court held that a student suspended for wearing a T-shirt condemning homosexuality may sue his school district for violating his First Amendment rights to free speech, free exercise of religion, and freedom from establishment of religion but not for Fourteenth Amendment rights to equal protection.27

4. The U.S. District Court for the Eastern District of Michigan held that a high school’s refusal to permit a student to voice opposition to homosexuality during a panel discussion on religion and homosexuality during a student assembly violated her rights to free speech, equal protection, and freedom from state establishment of religion.28

5. The U.S. Court of Appeals for the Eleventh Circuit remanded a case to the district court to determine if an Alabama school board violated a student’s free speech when his principal disciplined him for refusing to recite the Pledge of Allegiance.29

Prayer at School Board Meetings

School boards that open their meetings with prayer are violating the Constitution’s First Amendment Establishment Clause. The Sixth Circuit Court of Appeals relied on a series of prayer cases in rendering its decision. A school board started a practice of inviting clergy to offer prayer at its meetings. Later, one of the board members who was a minister began offering prayers at subsequent meetings. This practice was challenged by a student and a teacher who frequently attended board meetings. The federal district court upheld the board’s practice, finding that the meetings resembled legislative sessions rather than school events and relied on the 1983 U.S. Supreme Court ruling that allowed official prayers at the beginning of a state legislative session. The student and teacher appealed to the Sixth Circuit, which ruled that board meetings were held on school property, were regularly attended by students, and did not resemble legislative sessions. The court further emphasized that board meetings had a function that was uniquely directed toward students and school matters, making it necessary for students to attend such meetings on many occasions. The Sixth Circuit Court stated that prayer at school board meetings was
potentially coercive to students in attendance. The Circuit Court reversed the district court’s ruling, holding that prayer has the tendency to endorse Christianity through excessively entangling the board in religious matters.  

**Prayer at Legislative Meetings**

The U.S. Supreme Court at the time of the writing of this text is debating whether public prayer at a New York town’s board meeting is permissible. In *Galloway v. Town of Greece*, two local women are challenging the practice of including an opening prayer during monthly meetings. This practice is overwhelmingly Christian in nature. The women argued that officials repeatedly ignored their request to modify or eliminate the practice or make it more inclusive. The opening prayer has been offered since 1998 on a volunteer basis by accepting anyone who wishes to come and volunteer to offer prayer.

A federal appeals court in New York found the board’s policy to be an unconstitutional violation of the Establishment Clause. Interestingly, the nation’s legislature has offered similar prayers since the nation’s founding. Moreover, the U.S. Supreme Court begins its public session by invoking a traditional statement that ends with “God save the United States and this honorable court.” The Obama Administration has joined conservative states and federal lawmakers in urging the Supreme Court to tolerate prayer during governmental meetings. It appears that the High Court is not necessarily interested in banning prayer based on comments made by various justices. Subsequently, a divided court ruled that legislative bodies such as city councils can in fact begin their meetings with prayer, even if it plainly favors a specific religion. This 5–4 decision is landmark in that it opens the door for every governmental body in the United States to offer prayer before its meetings. However, the sharp disagreement among the Justices evolved around the view that the majority ruling could encourage public bodies to provide more freedom for religious expression in their ceremonial prayers and less concern regarding objections of religious minorities. The High Court’s five conservatives suggested that legislative prayers need not omit references to a specific religion—the prayers in question often invoked Jesus Christ and the resurrection. Those who pray before legislative meetings should be “unfettered” by what government officials find appropriate according to the High Court.

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**Prayer at School Events**

In light of the court rulings regarding prayer at graduation ceremonies, it would be prudent for administrators to develop carefully drawn guidelines to minimize legal challenges in this area, such as the following:

1. Develop legally defensible guidelines that are supported by the U.S. Supreme Court decision addressing student-initiated prayer at athletic contests and other school events.
2. Do not rely on customs and community expectations when encouraging student-initiated prayer at school events.
3. Student-initiated prayer is probably permissible at school events when not endorsed by school officials.
4. School officials should respond judiciously if alerted that school personnel are encouraging students to offer voluntary prayer at school-sponsored events.
5. Voluntary student-led prayer will likely pass court scrutiny when it is initiated solely by students without involvement of school personnel.
6. Prayer at school board meetings violates the Establishment Clause, creates excessive entanglement, and cannot be justified on the basis that such meetings are similar to legislative sessions rather than school events.
AID TO PAROCHIAL SCHOOLS

Public aid to parochial schools has created numerous legal questions and conflicts. School districts have been challenged on issues involving the awarding of free textbooks, transportation, tax credits, and auxiliary services. Many of these issues have received mixed reviews by the courts.

In cases where evidence reveals that the aid directly benefited the child rather than the parochial school, courts have been permissive in allowing certain types of aid under the child benefit theory. This theory is valid if parochial children are the primary beneficiaries of a public-supported service provided for all children. Conversely, if the aid serves to benefit primarily parochial schools, it will be deemed impermissible and a violation of the First Amendment. When state activities cannot be clearly separated from religious activities, excessive entanglement occurs, thus preventing a clear line of separation between the two.

The issue of aid to parochial schools continues to be contested, as strong advocates as well as opponents are involved in the debate. Advocates have requested the U.S. Supreme Court to reverse its 1985 decision that disallows public school teachers from providing Title I remedial instruction in parochial schools. The New York City Public Schools and Roman Catholic parents sought reconsideration of the 5–4 High Court decision in the Aguilar v. Felton case32 in which the court held that it was an unconstitutional establishment of religion for public school teachers to provide remedial classes in religious schools. This ruling created enormous costs incurred by the district through the purchase of mobile classrooms and leasing land to house them. These groups charged that these funds, roughly $14 million used to purchase mobile classrooms and lease land, could be better spent to support the Title I program.

An appeal in the Agostini v. Felton33 case arose when the New York City School Board filed a motion asking a federal judge to be relieved from the 1985 Felton ruling. The National Committee for Public Education and Religious Liberty argued that it would be more feasible for the district to send private school students to Title I school sites for instruction. There was no dispute that private school students are eligible for Title I services; how they can best be served is the disputed issue.

The district judge upheld the use of mobile classes and ruled that the U.S. Supreme Court’s decision could not be overturned. The U.S. Court of Appeals for the Second Circuit heard the board’s appeal, agreeing with the district court’s ruling that the U.S. Supreme Court’s decision could not be overturned. However, on appeal, the party was readdressed by the High Court. In a rather rare and surprising move, the Court revised its previous decision in Aguilar by ruling in a 5–4 decision that the Constitution does not prohibit Title I from serving eligible religious school students on their premises. The legal significance of the Supreme Court’s decision is that church–state barriers to Title I services no longer exist. These services can be provided to parochial students without offending church–state constitutional prohibitions.

The Lemon v. Kurtzman and Early v. Dicenso cases are perhaps the most significant early cases involving state aid to parochial schools. These cases arose when Rhode Island and Pennsylvania laws providing assistance to parochial schools, their students, and their teachers were challenged by various citizens and taxpayers. Rhode Island implemented an educational assistance program designed to assist private and parochial schools. This program provided supplemental teacher salaries for teachers who taught secular instruction in parochial schools. Pennsylvania enacted a similar statute but included assistance in purchasing supplies and textbooks in secular subjects.

Citizens in both states sought declaratory relief regarding practices that violated the First Amendment. The Pennsylvania District Court dismissed the complaint, whereas the Rhode Island court ruled that the practice was unconstitutional. The U.S. Supreme Court subsequently held that a law providing a state subsidy for nonpublic-school teachers’ salaries is unconstitutional, even when the funds are paid only to teachers of secular subjects. The High Court also struck down a state law that reimbursed nonpublic schools for expenses incurred in teaching secular subjects. Justice Burger, speaking for the majority, stated, “The First Amendment not only prohibits the passing of laws establishing religion but it also prohibits passing of a law respecting such establishment.”
This ruling referenced the famous Lemon Test (discussed previously in this chapter) in deciding on the constitutionality of certain practices involving public and parochial schools. Based on the Lemon standards, it was determined that a law must meet the following criteria to be legally valid regarding religion:

1. It must have a secular purpose.
2. It must neither advance nor inhibit religion.
3. It must not create excessive entanglement.\(^{34}\)

As aid to parochial schools continues to be challenged, the following examples illustrate the courts’ responses to certain practices:

1. Tuition reimbursement to parents of parochial school children is deemed unconstitutional.\(^{35}\)
2. Shared time and community education programs for parochial school students violate the First Amendment.\(^{36}\)
3. State financing of auxiliary services and direct loans for instructional equipment and materials for parochial schools is a violation of the First Amendment.\(^{37}\)
4. Tax deductions for parents of parochial school children do not violate the First Amendment.\(^{38}\)
5. Free public transportation for parochial school students does not violate the First Amendment.\(^{39}\)
6. Free textbooks for parochial school students at state expense do not violate the First Amendment.\(^{40}\)

Aid to students in religious schools received major impetus in a recent development in *Mitchell v. Helms*,\(^ {41}\) in which the U.S. Supreme Court ruled that a federal program that placed computers and other instructional equipment in parochial school classrooms did not violate the constitutional separation of church and state. Reversing an appeals court decision in a Louisiana case, the justices upheld, 6–3, a federal program that has distributed educational equipment and other materials to public and private schools since 1965. This practice was challenged by respondents who argued that direct nonincidental aid to religious schools is always impermissible. They further argued that the purpose of the direct/indirect distinction is to prevent subsidization of religion.

Concluding for the majority justices, Clarence Thomas, Antonin Scalia, and Anthony Kennedy supported the view that Chapter II of the Education Consolidation and Improvement Act of 1981, as applied in Jefferson Parish, is not a law respecting an establishment of religion simply because many of the private schools receiving Chapter II aid in the parish are religiously affiliated. Furthermore, Chapter II does not define its recipients by reference to religion. Aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.

Also, Chapter II does not result in governmental indoctrination of religion. It determines eligibility for aid neutrally, making a broad array of schools eligible without regard to their religious affiliations or lack thereof. Thus, it is not problematic that Chapter II could be fairly described as providing “direct” aid. Finally, the Chapter II aid provided to religious schools does not have an impermissible content. The statute explicitly requires that such aid be secular, neutral, and nonideological.

**Religious Symbols**

Public schools may not display religious exhibits or other visual materials. It may be appropriate, however, for public school teachers to acknowledge and explain the various holidays of all cultural and religious groups as a unit in cultural heritage or some other related subject, as long as a secular purpose is served.

Public school teachers should refrain from the use of religious symbols or pictures, even in conjunction with discussing the various holidays. A case could be made that the presence of the crucifix creates a religious atmosphere in the classroom. The presence of any type of religious symbol or picture would violate the principle of neutrality. Pictures of religious events may also create a religious atmosphere.
Religious Displays

Certain types of displays may be permitted in public school settings. For example, the City of Las Cruces, New Mexico, and its school district did not violate the Establishment Clause by incorporating three crosses into city and school district logos. The imagery was based on the city’s history and was not intended to endorse Christianity. The city and school district used a logo consisting of three interlocking crosses surrounded by a sun. The logo appeared on a sculpture, a mural at an elementary school, and on school maintenance vehicles. Resident taxpayers brought separate federal district court actions against the Las Cruces Public Schools and the City of Las Cruces challenging the use of a Christian symbol on the logo. The court held the district did not use the logo on school maintenance vehicles to proselytize. No evidence indicated the district’s stated purpose for using the insignia on school maintenance vehicles was insincere. The judgment was affirmed. In addition, it is permissible to employ seasonal decorations, such as snow, pine trees, wreaths, eggs, or bunny rabbits. These are considered merely reflections of the joy and merriment associated with various holidays, as long as they are not used to meet a sectarian purpose.

Public schools may not erect any type of religious display on school property. However, in 1963, one such display was held by a district in New York to be a mere passive accommodation of religion. This court supported the erection of a nativity scene on school grounds. The posture of the courts today would not support such a finding. It is indisputable that the presence of a nativity scene on school property violates the separation of church and state by demonstrating preference of one religion over another and is in clear violation of the Establishment Clause of the First Amendment. In fact, a different ruling occurred in Washegest v. Bloomingdale Public Schools in which the Sixth Circuit Court of Appeals held that a portrait of Jesus Christ that had been hanging outside the principal’s office in the hallway for thirty years was unconstitutional because it constituted the government’s endorsement of religion and an Establishment Clause violation.

Ten Commandments

Two early court decisions, one at the federal district level and the other by the U.S. Supreme Court, held that posting of the Ten Commandments in a public school is unconstitutional. North Dakota passed a law requiring the display of a placard that contained the Ten Commandments of the Christian and Jewish religions. The statute called for this display to be located in a conspicuous place in every classroom in public schools. The district court ruled that this practice violated the Establishment Clause of the First Amendment. Interestingly, the State Supreme Court of Kentucky in Stone v. Graham reached a tie decision regarding a statute that required posting the Ten Commandments in public school classrooms. The tie proved to be insignificant, when the U.S. Supreme Court in a 5–4 decision held that this practice was unconstitutional and a violation of the Establishment Clause of the First Amendment.

The U.S. Supreme Court issued split decisions in two cases involving the Ten Commandments on government property. It held in McCreary County, Kentucky v. American Civil Liberties Union of Kentucky that framed copies on the walls of two Kentucky courthouses were illegal and amounted to an accommodation to religion and a violation of separation of church and state. In a contrasting case, Van Orden v. Perry in Texas, the High Court held that a monument erected in 1962 served a less blatant religious purpose and served educational and historical purposes. In addition, it was located among other secular and educational markers on the grounds of the state capitol. The decisive vote was cast by Justice Stephen Breyer, who noted that the granite statue had stood for more than forty years without a complaint, whereas the framed copies posted in Kentucky sparked legal challenges as soon as they were posted. Those who opposed posting the Ten Commandments argued that the first four or five commandments made sole reference to Jewish and Christian religions, which made them offensive to non-Judeo-Christians. They argued further that these postings violate
the principle of separation of church and state. The courts, at most levels, tend to support the view that posting of isolated religious text and symbols in public buildings is a violation of separation of church and state and further violates the principle of neutrality to which governmental or state agencies such as public schools must adhere.

**Posting Religious Mottos and Expressions**

In recent developments, state boards of education across the country are developing resolutions supporting the posting of the Ten Commandments in public school buildings. These resolutions are strongly opposed by the American Civil Liberties Union. The view held by opponents of this practice is that such postings amount to a government endorsement of religion. State officials respond by suggesting that such postings teach civility as well as proper moral and ethical values badly needed by children.

Some state officials are supporting policies calling for posting the words *In God We Trust* in public schools as a motto that has been on U.S. currency since 1864. These efforts will undoubtedly result in legal battles as they are embraced by other school districts across the United States. For example, Colorado’s State Board of Education voted to urge schools to post *In God We Trust* in buildings throughout the state as a means of celebrating national heritage, traditions, values, and civic virtue.

Opponents are charging that the board is attempting to use a familiar and generally accepted phrase to inject religion into public schools. The resolution calls for the Colorado State Board of Education to encourage the appropriate display of this national motto in school buildings. Congress approved this phrase during the nineteenth century in response to a request from the clergy. The U.S. Supreme Court has never addressed this issue. However, several appeals courts have allowed its use on coins, suggesting that it does not amount to a government endorsement of religion. These developments point to the ongoing tension that exists between issues relating to separation of church and state and the level of emotions surrounding these issues. Only time will reveal how the courts will address these emerging conflicts.

**Religious Banners at Football Games**

A district court judge upheld cheerleaders’ use of religious banners at football games after the school district in Kountze, Texas banned the displays. Consequently, cheerleaders may continue to display their Bible verse banners at football games. The judge held that the display did not violate the Constitution. The cheerleaders captured national attention when they sued the school district in a case that pitted freedom of expression rights against the separation of church and state clause in the federal Constitution. One of the banner displays read, “If God is for us, who can be against us? Romans 8:31.” Evidence in this case revealed that religious messages displayed on run-through banners did not and will not create an establishment of religion in the Kountze community.

The cheerleaders’ suit was aided by the conservative Texas-based Liberty Institute who argued that the ban violated both the cheerleaders’ religious and freedom of expression rights. The essential difference that likely led to the decision favoring the cheerleaders is that the school district was not promoting religion, which would be an Establishment Clause violation. The cheerleaders received no coercion by the district to display the banners. They did so by privately promoting their own views. The Anti-Defamation League criticized the ruling by indicating that football games are a quintessential school event. Cheerleaders are a key part of that event. The league suggested further that the decision flies in the face of clear U.S. Supreme Court and other rulings. It was suggested that the banners conveyed the message that the school supports and promotes one religion over another. The school district has filed an appeal and is seeking further clarification from the judge. The community unanimously supported the banners. If this ruling stands, it will be interesting to see if other cheerleader groups around the country will be inclined to display religious banners at their football games.
USE OF SCHOOL FACILITIES BY RELIGIOUS STUDENT GROUPS

The use of school facilities by student religious groups continues to create friction between students and school officials. Considerable tension has mounted in recent years between administrators and student religious groups regarding access to school facilities during the school day. At issue is the growing debate regarding the viability of the Equal Access Act. Does the act, in fact, provide free access to student religious groups? Are students’ First Amendment rights violated when access is denied? Under what circumstances may student religious groups be denied access?

Congress attempted to address these issues when it passed the Equal Access Act in 1984 for the express purpose of providing student religious clubs equal opportunities to access high school facilities as enjoyed by other noncurricular clubs. Under federal statute, it is unlawful for any public secondary school receiving federal financial assistance that has created a “limited open forum” to deny access to student-initiated groups on the basis of the religious, political, or philosophical content of their speech. A limited open forum exists when an administrator allows one or more noncurricula-related student groups to meet on school premises during noninstructional time.

Before the passage of this act, the U.S. Court of Appeals for the Second, Fifth, Tenth, and Eleventh Circuits had routinely denied access to student religious clubs. With the passage of this act, controversy still exists regarding its interpretation. For example, do school administrators have the right to deny students access, and do students have a constitutional right to be provided access? Based on the intent of the act, it would be unlawful for a student religious group to be denied use whereas other noncurricular student groups were not. If the school claims not to have a limited open forum, there likely would not be an infringement of students’ personal rights. Perhaps the most controversial issue to date is the question of exactly what constitutes a limited open forum. With increasing frequency, administrators appear to be taking the position that limited open forums do not exist in their schools as a means of disallowing free access to student religious clubs.

A limited open forum is established whenever a public school grants an offering to or opportunity for one or more non–curriculum-related student groups to meet on school premises during noninstructional time. The following conditions should apply:

a. The meeting should be voluntary and student-initiated.
b. There is no sponsorship of the meeting by the public school.
c. Employees of the school are present at religious meetings only in a nonparticipatory and supervisory capacity.
d. The meeting does not materially and substantially interfere with orderly conduct and educational activities within the school.
e. The meeting is not controlled by any persons or groups not affiliated with the school.

In summary, then, if a school official allows any noncurricular student club to use school facilities, then student religious groups also must be allowed equal access. The viability of the Equal Access Act has been debated across the nation, including cases in Texas, Nebraska, Washington, Pennsylvania, and Virginia.

Legal Precedents

As administrators deal with student religious clubs, their actions should be guided by a sense of fundamental fairness and respect for the First Amendment rights of others. The U.S. Supreme Court earlier bypassed an opportunity to set an important precedent in this area in 1986 when it declined on technical grounds to review a Bible-study case, Bender v. Williams Sport. By failing to hear this case, the Supreme Court left the issue to be decided by the lower courts, thereby failing to create uniform compliance across the country and address the constitutionality of the law itself. However, the Supreme Court did address the issue in 1990. Between 1986 and 1990, a number of lower court decisions were rendered in various states across the country. Following is a brief description of those decisions.
In a 1988 case, *Mergens v. Board of Education of the Westside Community Schools*, the district judge ruled that an Omaha district did not create an open forum for student speech and, thus, did not need to allow a Bible student club to meet at the high school. Rossford high school students had a band that performed mostly Christian songs. The father of one student was a school board member and the band’s manager. He sought approval for a band performance at a school-wide assembly during school hours. The district superintendent first approved the performance but cancelled it after a school attorney warned of Establishment Clause problems. Band members sued the school district in a federal court, asserting that their appearance was cancelled because of disapproval of their Christian message.

The court rejected the band members’ claim that the assembly was a public forum in which the district had to maintain viewpoint neutrality. The assembly was not a “forum” of any kind, and for that reason, the district was not subject to any neutrality requirement. The school district “was entitled to exercise editorial control” over it. When the school itself was the speaker, educators were entitled to exercise greater control to assure the views of speakers were not erroneously attributed to the school. The school district could impose a ban against the band members because of their Christian religious identity. The court awarded pretrial judgment to the school district.

In 1992, in yet another case, *Clark v. Dallas Independent School*, a U.S. district judge ruled against a prayer group whose meetings grew into loud revivals involving proselytizing of other students. In his ruling, the judge indicated that the Equal Access Act may, in fact, violate the First Amendment Establishment Clause.

To avoid the label of limited open forums under the Equal Access Act, many districts either have refused to permit any extracurricular clubs access or have created extremely broad definitions of precisely what is curriculum related. This, then, allows schools to maintain school-based clubs without recognizing religious clubs.

On appeal, the U.S. Supreme Court addressed the equal access issue in the *Board of Education of Westside Community Schools v. Mergens*. The High Court was faced with deciding whether the Equal Access Act prohibited Westside High School from denying a student religious group access to school facilities and, if so, whether the act violated the Establishment Clause of the First Amendment.

Students at Westside were provided more than thirty clubs from which to choose, all of which met after school. Membership was voluntary, and a club sponsor was required for each club based on board policy. Board policy further stipulated that no club or organization shall be sponsored by any political or religious organization or by any organization that denies membership based on race, color, creed, gender, or political belief. Mergens, a student, petitioned Westside High for permission to conduct a religious meeting on school premises. Her request was denied on the basis that the meeting would violate the Establishment Clause. A suit subsequently filed by Mergens contended that the denial violated the Equal Access Act. The school responded by indicating that the act was unconstitutional and did not apply to the school. The district court held for Westside in supporting the denial. However, the court of appeals reversed the district court’s decision, holding that the act was constitutional and that Westside was in violation of the act.

The case reached the Supreme Court when the district appealed. Justice Sandra Day O’Connor, speaking for the majority, affirmed the court of appeals’ ruling by stating that the Equal Access Act constitutionally prohibits a limited open forum from denying a student group’s request to use school facilities based on the religious content of their meeting. The act intended to grant equal access to secular and religious speech. Because the meeting occurs during noninstructional time and limits school official participation, the Equal Access Act creates no substantial risk of excessive entanglement. The court of appeal’s ruling was affirmed.

Based on the High Court’s ruling, schools that provide a limited open forum may not permit certain groups to use school facilities while denying others. Once a limited forum is established, it must be equally accessible among all student groups, and it may not be restricted based on religious, political, or philosophical ideologies. Schools may bar such clubs if those schools have a closed forum in which no clubs are allowed to use school facilities during noninstructional
hours. Whether the school district maintains a limited open forum or a closed forum is left to the discretion of the school district, unless otherwise determined by state statute. Once the decision is reached regarding either of these options, consistency and fairness must prevail, as the option chosen is executed by the district. In a significant case involving the use of school facilities by a student club, the Court declined to review a Ninth Circuit decision that held a school district did not violate the U.S. Constitution when it denied recognition to a student club based on its name—Truth—and its restriction of voting membership to those who professed belief in the Bible and Jesus Christ. The Ninth Circuit found the restrictions inherently excluded non-Christians, in violation of school district nondiscrimination policies.

Issues involving religious freedom are highly charged emotionally, and thus the Equal Access Act continues to be a stormy matter, with no indication that this will change in the foreseeable future. As administrators deal with student religious clubs, their actions should be guided by a sense of fundamental fairness and respect for the First Amendment rights of others. These actions should not be taken simply because the courts mandate them but rather because fair administration is right and proper.

Administrators should ensure that criteria, rules, and regulations governing student clubs are carefully drawn and communicated to all students. Ideally, student representatives should be involved in the policy development process. All efforts should be made to provide equal protection for all groups, regardless of philosophical ideology. The only way this can be achieved is through a strong conviction and commitment to fairness for all students irrespective of differences that might exist regarding their religious or moral beliefs.

### Administrative Guide

#### Equal Access

1. Do not allow some student clubs with similar noncurricular functions to meet on school premises while denying other religious clubs this same privilege, especially where there are ideological differences between the administration and the student groups.
2. Avoid denying religious clubs access based on personal or philosophical disagreement with the clubs’ objectives.
3. Do not establish extremely broad definitions as to what is considered curriculum related in an effort to ban religious clubs.
4. Avoid classifying all other clubs as curriculum related irrespective of function and disallowing the same classification for religious clubs.
5. School authorities should consult the district’s legal counsel regarding any questionable religious activities in their school.
6. High school student religious clubs may be allowed to use school facilities if the school supports a limited open forum. They cannot be denied use if other noncurricular groups are permitted to use facilities before or after the school day.

#### USE OF SCHOOL FACILITIES BY OUTSIDE RELIGIOUS GROUPS

Many local school districts, in an effort to be responsive to their communities, provide access to school facilities for various public organizations during noninstructional hours. This accommodation is typically viewed as a positive gesture and one that is consistent with the view that schools serve as centers for community activities. In most instances, minimal conflict arises between local school officials and community organizations over the use of school facilities.

However, one area that often creates controversy, friction, and even legal challenges involves the use of school facilities by community-based religious groups. Legal challenges by these groups usually involve allegations that school officials’ denial of access to district facilities amounts to a violation of their freedom of expression and equal protection rights under the laws.
School officials respond that the district must maintain a clear separation between religious activities and state activities based on First Amendment prohibitions. When denying access to religious groups, are school officials, in fact, infringing on the group’s free exercise and freedom of expression rights? How far can school districts go to accommodate religious organizations? How do district officials respond to the needs of religious groups without violating First Amendment prohibitions involving church–state relations? How do they respond to challenges by other citizens who contend that the use of school facilities by religious groups offends the community? School district officials find themselves in a precarious position when they attempt to make reasonable accommodations to religious groups without offending the Establishment Clause of the First Amendment, which prohibits staff support of religious activities.

**Relevant Cases**

The following cases illustrate the court’s position on the use of school facilities by religious groups. A community church, through its minister, requested the use of a school facility for regular Sunday services and was told that district policy prohibited the use of school facilities for any religious purpose. The policy stated that district facilities shall be open to public, literary, scientific, recreational, or educational meetings or for discussions on matters of public interest. Although the portion of the policy dealing with religious activity was later removed, the church was denied access. The church contended that an open forum existed based on the language in the policy and that the denial violated their right to free speech and assembly.

The court did find that the district’s community use policy created an open forum. However, it held that the practice of excluding religious organizations from holding religious services in its facilities was justified. The court ruled that religious services held on a regular basis would violate the Establishment Clause. This violation provided a compelling reason to justify the content-based restriction of the open forum.

In contrast, the court supported a religious organization in the *Gregoire v. Centennial* case, when the Centennial School District developed a facilities use policy prohibiting religious activities within its buildings. A district court enjoined the policy, thus allowing the plaintiff to use a school auditorium to hold a magic show after which an evangelical message was given. The school district then altered its policy to include a list of organizations that were allowed to use school facilities. This new policy also included a prohibition on religious services as well as the distribution of religious materials. The plaintiff requested to use the facility again if it were open to the public, claiming that facilities are open forums and prohibitions against religious activities violated equal protection, free speech, and the exercise clause of the First Amendment. The court held that the new policy still created a prohibition against religious activity and a violation of the plaintiff’s free speech and free exercise rights. The court noted that the list of other groups who could use facilities created an open forum. Once created, the plaintiff cannot be denied access based on content of speech.

In a landmark case involving use of school facilities by a religious group, *Bronx Household of Faith v. Community School District No. 10* (1997), the U.S. Supreme Court rejected an appeal from an evangelical Christian church that had sought to use a middle school gymnasium in New York for religious services. This religious group contended that the school district should not be permitted to ban the use of the gym by religious groups while allowing other community groups to use it. According to the plaintiffs, this amounted to discrimination.

By policy, the New York City Board of Education permits rental of schools for a variety of community purposes, including religious discussions, but prohibits their use for religious services. The Bronx Household of Faith challenged this rule in federal district court. The district court ruled for the school district. On appeal, the U.S. Court of Appeals also ruled for the school district. In its ruling, the appeals court indicated that the use of school facilities by community groups created an open forum rather than a traditional public forum. Under First Amendment freedoms, government restrictions on speech in a public forum are held to very strict scrutiny. However, in a limited open forum, such as a public school, the government can restrict speech
if it makes reasonable and viewpoint-neutral distinctions among speakers. Further, public school officials reasonably might wish to avoid the appearance of sponsoring religious services. Because the U.S. Supreme Court rejected an appeal, the appeal court’s decision stands.

Finally, in the *Lamb’s Chapel v. Center Moriches School District* case (1993)\(^59\) involving a closed forum, an evangelical Christian church applied on four occasions for approval to use public facilities of a local high school for various nonsecular functions, including family-oriented films with a Christian perspective. Each request was denied by school officials because the proposed functions were church related and had religious connotations. School officials relied on a New York State law that bars the use of district facilities for religious purposes. The minister of the church brought legal action against the district, claiming First and Fourteenth Amendment violations—freedom of speech and equal protection of the law, respectively. The Second Circuit Court of Appeals held that the facilities were not deemed open forums; therefore, the church’s First and Fourteenth Amendments rights were not abridged. However, the U.S. Supreme Court unanimously ruled that the district’s rule was unconstitutional as applied to the film series. The Court acknowledged that the district, like a private owner of property, could have preserved its property for the use to which it was dedicated and need not have permitted any after-hours use of its property. However, once the district voluntarily made its facilities available for use by after-hours groups, it could not enforce rules designed to exclude expression of specific points of view. School officials must remain viewpoint neutral in approving use of school facilities by community groups. The Court further concluded that to permit Lamb’s Chapel to use the facilities would not violate the Establishment Clause because it would have neither the purpose nor primary effect of advancing or inhibiting religion and would not foster excessive entanglement with religion.

**Use of School Facilities by Community Groups**

Local school boards, either through implied powers or specific authority, have the capacity to formulate policies governing the use of school facilities within their districts. By policy or practice, school officials may permit public groups to use school facilities during noninstructional hours as long as their activities do not interfere with normal school operations. Unless otherwise prescribed by state statute, districts are not required to provide facilities to community groups. It is within the discretion of school boards to determine if the district will support an “open forum.” An open forum is present when the district allows community groups to use its facilities during noninstructional hours. If supported, the district may not discriminate against any community group based on philosophical or ideological differences. The district must remain viewpoint neutral in accommodating these groups. However, if the district chooses a closed forum, then no community groups are allowed to use facilities. Under an open forum, districts may prescribe certain policies regarding the use of their facilities with respect to maintenance, safety, and overall operations. Reasonable fees may also be imposed to cover costs associated with opening, closing, cleaning, and generally maintaining facilities during use by community groups. A closed forum, however, is a place that traditionally has not been open to public expression. Restrictions on access by school districts will generally be upheld as long as such restrictions are viewed as reasonable and not based on speech content. Closed forums may not be used to suppress a particular viewpoint. School officials must remain viewpoint neutral. School district officials may opt to support a limited open forum or a closed forum as long as their policies are applied consistently and they remain viewpoint neutral.

**Right to Deny Access**

School districts may deny access to community groups even when an open forum exists in instances where there is evidence of abuse or destruction of property. Willful violation of district policy or local or state laws also may result in denial of use. If the facility is used for subversive activities aimed at carrying out unlawful objectives, access may be justifiably denied. In addition, criminal charges may be levied against guilty parties depending on the circumstances surrounding...
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each case. Activities conducted in school facilities that pose a threat to public safety may also be curtailed. The district should have approved written policies that address all aspects of facility use by community groups. All approved policies governing the use of district facilities must be applied fairly and consistently with all groups, including religious groups.

When conflict arises over denial of school facilities by school officials, it will usually involve either freedom of association, freedom of expression, or equal protection challenges. School districts will normally be supported by the courts in cases involving denial based on issues pertaining to unlawful acts, threats to health or safety, and destruction of school property. They generally will not be supported in matters involving free speech and association or equal protection violations. When challenges arise, the courts will examine all relevant facts surrounding the particular case and will determine if a substantive right is in question.

Administrative Guide

Use of Facilities by Outside Religious Groups

1. School districts must allow religious groups access to their facilities if other nonreligious groups are permitted to use them.
2. School officials are not expected to allow religious groups to use facilities for regular religious services, even when an open forum is established by the district.
3. School districts are not required to accommodate religious groups under a closed forum policy.
4. In the absence of religious services, school officials must remain viewpoint neutral in permitting religious groups to use facilities under an open forum.

RELIGIOUS ACTIVITIES AND HOLIDAY PROGRAMS

The observance of holy days by public schools is clearly an unconstitutional activity if conducted in a devotional atmosphere. The First Amendment prohibits states from either aiding religion or showing preference for one religion over another. Public schools may not celebrate religious holidays. No worship or devotional services nor religious pageants or plays of any nature should be held in any school. However, certain programs may be conducted if a secular purpose is clearly served.

For example, the district court upheld a school’s Christmas program in South Dakota when certain parents challenged the religious content of a Christmas program that was sponsored, based on school district policy. The district’s policy was challenged on the grounds that it violated the Establishment Clause of the First Amendment. The U.S. District Court of South Dakota held for the school district in ruling that the performance of music containing religious content does not within itself constitute a religious activity, as long as it serves an educational rather than a religious purpose.60

Schools, however, are prohibited from the use of sacred music that occurs in a devotional setting. This type of music may be sung or played as a part of a music appreciation class, as long as a secular purpose is served. School choirs and assemblies may be permitted to sing or play holiday carols, as long as these activities are held for entertainment purposes rather than religious purposes. A religious music case arose in Washington State based on public complaints regarding religious music at graduation. A Washington school district received complaints regarding religious music selections at a 2005 high school graduation ceremony. As the 2006 graduation approached, administrators rejected the school wind ensemble’s selection of “Ave Maria,” believing it created a risk of new complaints. They requested that the ensemble make another selection. A student member of the wind ensemble sued the school district and superintendent for constitutional violations. A federal district court held that the district did not violate the student’s rights. On appeal, the U.S. Court of Appeals, Ninth Circuit, held that instrumental music was “speech” for First Amendment analysis purposes. Schools are not considered public
forums for speech unless they are opened up by officials for indiscriminate use. A limited public forum for expression had been opened in this case because of the district’s tradition of allowing seniors to select the music for their graduation ceremonies. In a limited public forum, restrictions can be based on subject matter, so long as distinctions are reasonable in light of the purpose of the forum. Here, the school district acted reasonably to avoid repeating the prior year’s controversy. The court affirmed the judgment for the district.61

Merry Christmas Bill

The Texas legislature passed the Merry Christmas Bill in 2013, which protects Texas’s right to acknowledge traditional holidays on school grounds. There was a view in Texas that children have been denied the opportunity to enjoy the activities and joy of celebrations in their school whether Christmas, Hanukkah, Kwanzaa, or others. This bill protects Texas public schools from legal challenges while stressing that freedom of religion is not the same as freedom from religion. It also removes legal risks of saying “Merry Christmas” in schools while extending protection to traditional holiday symbols such as a menorah or a nativity scene so long as more than one religion and secular symbol are reflected. The motivation for this bill arose when a Republican representative discovered that his son’s school had erected a “holiday tree” in December for fear that mentioning Christmas could prompt litigation.

Released Time for Religious Instruction

Releasing public school students for religious instruction has not been a major issue in recent years. Public school officials are aware that a very fine line separates church and state relationships. Landmark rulings prohibiting prayer, Bible reading, and financial aid to parochial schools have heightened awareness among public school officials of the need to adhere to the principle of neutrality regarding their role in religious matters affecting the operation of public schools.

Prior to these landmark decisions in the 1960s, it was not an uncommon practice in some districts to observe teachers of religious instruction entering public schools to teach religious classes for students whose parents granted consent. This practice involved virtually all denominations. Because no public school funds were involved in teaching these classes, the commonly held view was that such practices were an acceptable accommodation to parents and students who wished to participate in religious instruction.

However, in a leading Illinois case, the U.S. Supreme Court held that offering religious instruction on a released-time basis in public schools was unconstitutional. The case arose when the board of education initiated a program that permitted representatives of various religious groups to provide religious instruction during the school day on a voluntary basis. McCollum, a private citizen and a parent, challenged this practice as a violation of the Establishment Clause of the First Amendment and sought declaratory relief.

The school district stressed the point that no school resources were involved and those students who did not wish to participate in religious instruction were allowed to move to some other location in the building for secular instruction. Class attendance records were maintained by religious instructors. However, the facts revealed that school property was utilized for religious instruction and a close relationship had emerged between the school and religious organizations. The state trial court upheld this practice. The state supreme court affirmed the trial court’s ruling.

However, the U.S. Supreme Court reversed that decision, holding that “the state may not permit religious teaching on tax-supported public school property during regular school hours.” This practice aids religion through the implementation of compulsory attendance laws and was deemed to be a violation of the First Amendment, which created a wall of separation between church and state that must be respected.62

In a later case with a slightly different slant, the U.S. Supreme Court upheld a released-time program involving religious instruction. This case involved a New York City program that permitted public schools to release students during the school day to attend religious instruction at religious
centers at locations around the city. All administrative activities were coordinated by the religious organization, which assumed full responsibility for transportation and attendance reporting.

Zorach, a citizen of New York, filed suit, challenging this practice as a violation of the First Amendment’s ban on separation of church and state. Zorach further charged that normal school activities ceased while students were transported to religious centers and that public school teachers were required to monitor students released to attend these centers.

The U.S. Supreme Court upheld this practice by stating that the city may permit public school students to attend religious centers during school hours because no compulsion is involved and no public school resources are expended. Parents decide whether their children will attend religious centers, and because this program is voluntary public schools do no more than make a mere scheduling accommodation. The Court held that this practice did not violate First Amendment prohibitions.

Although both programs were voluntary in nature, the obvious difference between these two cases rests on one important fact: In the McCollum case, the school utilized resources in the form of classrooms during the school day, whereas in the Zorach case no public tax-supported resources were involved. In a more recent development, the U.S. Court of Appeals for the Tenth Circuit held a released-time program unconstitutional that allowed students to attend religious seminars and receive public school credit for classes that were viewed as denominational in nature.

Teaching the Bible in Public Schools

Many school officials shy away from endorsing Bible teaching for fear of inviting lawsuits. School students, however, learn beyond rudimentary knowledge of the Bible. For example, Shakespeare’s works contain numerous references to the Bible. Mark Twain’s works also contain biblical references.

Although the use of the Bible in school for religious purposes is unconstitutional, some public schools across the nation are introducing Bible classes into the curriculum. There is strong advocacy for and against teaching the Bible in public schools. Many critics of public schools who support Bible teaching cite the decay of moral values as a leading cause of serious discipline problems and gross disrespect for authority.

Some educators believe that knowledge of the Bible is critical to understanding the best literary works as well as historical and contemporary speech and writing. Those educators who oppose teaching the Bible in public school contend that it promotes a specific Christian interpretation and runs the risk of teachers indoctrinating students to a religious belief. In spite of opposition, the Bible may be taught in public schools as a part of the school’s curriculum if it is not associated with any form of worship and it is taught objectively as a part of a secular program. In fact, the U.S. Supreme Court ruled in an early case, Stone v. Graham, that the Bible may be used constitutionally as an appropriate study of history, civilization, ethics, or comparative religion. In supporting this view, a national council on Bible curriculum in public schools was formed by congressmen, legislators, and attorneys across the nation to ensure that reliable information and legal support of schools’ right to teach the Bible as an elective are ensured.

The tension between church and state persists, as reflected by ongoing litigation involving the use of the Bible in public schools. For example, in Gibson v. Lee County Board of Education plaintiffs challenged the practice of teaching the Bible in public schools by contending that the specific curricula adopted by the school board did not present the Bible objectively as part of a secular program in education. They argued further that the school district’s intent in officially offering and preparing to teach courses entitled Bible History: Old Testament and Bible History: New Testament is designed to promote religion generally and Christianity specifically, resulting in excessive entanglement. The court noted, using the Lemon criteria, that no government act or practice can be upheld under the Establishment Clause unless it (1) was adopted for a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster an excessive government entanglement with religion. Plaintiffs argued that the Bible history curricula adopted failed all three tests.
The court held for the school district based on its view that the district satisfied the secular purpose requirement by adopting a curriculum that was modified on the advice of the school board’s legal counsel. The court also noted that the teachers for the proposed Bible history class had been properly instructed on how and what to teach and what not to teach. The court concluded that it could not evaluate the second and third Lemon requirements without some record of classroom instruction involved in teaching the Bible history classes.

In a contrasting case, Wiley v. Franklin, a federal district court found that the account of the resurrection of Jesus Christ as presented in the New Testament constitutes the central statement of the Christian religious faith. The court further found that the only reasonable interpretation of the resurrection is a religious interpretation. The court noted that counsel for the defendants recommended the deletion of references to the resurrection, as well as many other modifications to the proposed Bible History II curriculum. The court found that plaintiffs had established a substantial likelihood of success on merits regarding the Bible History II curriculum adopted by the school board.

Finally, in a significant ruling, a federal district court ruled in Elrod v. Burns that an infringement of plaintiff’s First Amendment rights guaranteed by the Establishment Clause, even for minimal periods of time, constituted irreparable injury.

### Administrative Guide

**Bible Teaching**

1. The Bible must be taught objectively and in a strictly secular manner.
2. Teachers should not create a devotional (religious) atmosphere when teaching the Bible.
3. Teachers assigned to teach the Bible as part of the school’s secular program must be properly instructed on how and what to teach.
4. School officials should formulate policies governing Bible teaching through the involvement of teachers, students, and, where appropriate, parents and community leaders.
5. Bible-teaching policies should be communicated effectively to teachers, students, and parents.

### Intelligent Design and School Curriculum

*Intelligent design (ID)* is a controversial concept that suggests that certain features of the universe, including living things, exhibit characteristics of a product derived from an intelligent cause rather than a natural selection. Advocates of ID believe that the concept has equal status with other current scientific theories regarding the origin of life. Supporters of this theory believe that the ultimate designer of living things is God. This concept has invited legal challenges regarding its inclusion in public school curricula.

For example, the *Kitzmiller v. Dover Area School District* lawsuit arose in Dover, Pennsylvania, to challenge a policy formulated by the Dover school board requiring students to be introduced in a ninth-grade biology class to the intelligent design theory along with the theory of evolution. The school district revised the science curriculum to include a unit that explores the gaps or problems in the theory of evolution along with an introductory unit on intelligent design. A high school teacher testified that she and her colleagues refused to read a statement regarding intelligent design in class because they failed to view the concept as a viable scientific alternative to the theory of evolution. Eleven parents, joined by the American Civil Liberties Union of Pennsylvania, filed suit and challenged the board’s policy. Based on the policy, a four-paragraph statement would be read to biology students describing evolution as not being factual while introducing intelligent design. The issue presented to the court centered on whether teaching intelligent design is constitutionally permissible. Plaintiffs asserted that the Dover School Board identified intelligent design as a means of inserting Christian beliefs into science classes. The school board contended that its policies simply promoted scientific inquiry. Plaintiffs argued...
that intelligent design is not a science and should not be taught in public schools because it violates the Constitution. The defendant school board filed a motion for summary judgment. The U.S. district court denied the motion for summary judgment. In what is referred to as the Scopes case of the twenty-first century, U.S. District Judge John E. Jones, III, ruled that it is unconstitutional to teach intelligent design, a concept critical of Darwinian evolution theory, in public classrooms. The court’s decision is binding only on the parties involved in this case, but it may impact how certain subjects, such as biology, are taught.

The basis of this decision centers on a view that intelligent design has religious connotations and thus violates the separation of church and state, specifically the Establishment Clause of the First Amendment. The judge’s decision will not likely weaken the interest in intelligent design.

**Administrative Guide**

**Intelligent Design**

1. Advocates of intelligent design argue that it is not based on the Bible, is a scientific theory, and should have equal status with other scientific theories. However, this view has not received significant support by the scientific community.
2. The theory of intelligent design suggests that certain features of the universe and of living things are best explained by an intelligent cause rather than a natural selection.
3. Intelligent design asserts that physical and biological systems in the universe result from a purposeful design by an intelligent being rather than from chance or undirected natural causes.
4. A district judge in Pennsylvania has ruled in *Kitzmiller v. Dover* that teaching intelligent design is unconstitutional because it carries religious connotations.
5. Unless ruled unconstitutional by a federal court in its jurisdiction, the decision regarding inclusion of intelligent design into the school’s curriculum is left to the discretion of school boards because the U.S. Supreme Court has not addressed its legality.

**Theory of Evolution**

Darwin’s theory of evolution subscribes to the view that all life is related and has descended from a common ancestor. From a scientific perspective, the theory of evolution is not viewed as a hunch or a guess but rather a fact. Evolution is considered to be a well-substantiated explanation of the origin of man. It is based on the view that life evolved from nonlife in a purely naturalistic fashion with some modifications. The evolution theory supports the notion that complex creatures evolved from more simplistic ancestors over time. In essence, random genetic mutations became part of an organizational genetic code. These beneficial mutations were preserved and passed on to the next generation to facilitate their survival in a process referred to as natural selection. Many scientists believe that evolution is the force that connects all biological research. Thus, biologists consider biological evolution to be a fact based on historical evidence. According to biologists, it is indisputable that major life forms currently on Earth were not represented in the past. In fact, most life forms of the past are not living today. The important question facing scientists does not appear to be whether evolution occurred but rather what mechanisms facilitated its occurrence. Thus, the debate among scientists focuses only on the details of how evolution occurred rather than whether it occurred.

Some people reject evolution, however, for religious purposes. They tend to oppose evolution as a fact as well as mechanism theories associated with it. Still others reject evolution theory because it conflicts with the Creationists who support the view that each species on Earth was placed here by a divine being.

**Teaching the Theory of Evolution**

Classroom instruction regarding evolution theory has resulted in legal challenges. In the past, many states banned evolution from school curricula based on the belief that it was in direct conflict with
the biblical version of creation. For example, the U.S. Supreme Court, in *Epperson v. Arkansas*, examined the constitutionality of an Arkansas law that rendered it illegal for teachers to teach this theory. The court concluded that Arkansas law could not be defended as an act of religious neutrality. The law did not attempt to ban curricula in schools and universities regarding all discussions of the origin of man but rather a particular theory because it was thought to conflict with the biblical account. The court found the law to be unconstitutional. The *Epperson* case summarily prevented legislatures from banning the teaching of evolution in public schools. The court based its decision on the view that evolution is a science rather than a secular religion. The *Epperson* case was significant in providing a clear distinction between science and secular religion.

Interestingly, in the famous *Scopes “Monkey Trial*” in 1927, the Tennessee Supreme Court upheld a law that prohibited the teaching of any theory that conflicted with the Genesis version of creation. Following the *Epperson* ruling, creationists attempted to support laws that provided equal emphasis on biblical accounts of creation during times in which evolution was taught in public schools. This issue was settled in 1987 in *Louisiana in Edwards v. Aguillard* when the U.S. Supreme Court invalidated Louisiana’s statutes that called for equal time for creation science whenever evolution was introduced into the curriculum. The court concluded that such law unconstitutionally advanced religion and represented a clear violation of the Establishment Clause.

In a related case, a federal district court in Georgia held that a school district’s application of stickers to science textbooks cautioning about the scientific validity of the theory of evolution violates the Establishment Clause of the U.S. Constitution. The court also ruled that the stickers violate the Georgia constitution. For years, Cobb County School District maintained a policy that the origins of life must only be taught in elective courses and never as part of the required science curriculum. Although this policy did not expressly refer to evolution, it was implemented for the purpose of avoiding conflict with a large segment of the school district’s residents whose religious beliefs are inconsistent with the theory of evolution. However, in 2001 the school board decided to strengthen evolution instruction and bring the district into compliance with statewide curriculum requirements. Part of this process involved adopting new science textbooks. When members of the community, identified as creationists, submitted a petition objecting to evolution being taught “as fact rather than theory,” the idea of affixing stickers to the textbooks was produced by school district legal counsel. “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.” In the fall of 2002, the school district began affixing the stickers to all science textbooks that discussed the origins of life. A group of parents sued, alleging that the stickers violated the U.S. Constitution’s Establishment Clause. The district court addressed the Establishment Clause challenge by applying the three-pronged test enunciated in *Lemon v. Kurtzman*.

Under the *Lemon* test, a government action passes First Amendment muster if (1) it has a secular purpose, (2) its principal or primary effect is neither to advance nor to inhibit religion, and (3) it does not create excessive entanglement of government with religion. The court noted that the second and third prongs have merged into a single “effect” inquiry. Addressing the purpose prong, the district court found that the board’s purpose was to assure members of the community who opposed the teaching of evolution based on their religious beliefs. Although this purpose is intertwined with religion, the court held that it was valid and secular because the presentation of evolution was not unnecessarily hostile. Fostering critical thinking was also a valid secular purpose. The court did not find that these purposes were merely a “sham” for promoting religion. Turning to the “effect” prong, the court noted that the disclaimer language must be analyzed to determine if it “conveys a message of endorsement or disapproval of religion to an informed reasonable observer.” The court concluded that the sticker fails to satisfy the effect prong because a “reasonable observer” would interpret it as sending a message to “those who oppose evolution for religious reasons that they are favored members of the political community” and “to those who believe in evolution that they are political outsiders.” A reasonable observer would be aware of the heated debate and therefore would view the sticker as endorsing “the viewpoint of Christian fundamentalists and creationists that evolution is a problematic theory lacking an adequate foundation.”
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In a related case, *Freier v. Tangipahoa Parish Board of Education*, the board of education adopted a policy mandating that a disclaimer be presented prior to any discussion of evolution in biology indicating that the theory of evolution should be presented to inform students of the scientific concept and is not intended to influence or dissuade the biblical version of creation or any other concept.76 The district was sued by parents for violating the Establishment Clause of the U.S. Constitution and was supported by the U.S. District Court and the Fifth Circuit Court of Appeals. The district appealed to the U.S. Supreme Court, who in a 6–3 decision declined to hear the case, thus allowing the lower court court decision to stand.

**Administrative Guide**

**Theory of Evolution**

1. Evolution theory suggests that all life is related and has descended from a common ancestor.
2. Historically, evolution theory had been banned from public school curriculum based on a view that it conflicted with the biblical version of creation.
3. The U.S. Supreme Court, however, in *Epperson* prevented lawmakers from banning the teaching of evolution in public schools, holding that evolution is a science rather than a secular religion.
4. Biological evolution is considered to be a fact based on historical evidence by biologists.
5. The prevailing debate among biologists revolves around details of how evolution occurred rather than whether it occurred.
6. The evolution theory provokes controversy between the scientific community and certain evangelical and fundamentalist Christian religious groups based on their attempts to prevent the teaching of evolution by having it replaced with teaching from their religious traditions.
7. The decision regarding the inclusion of evolution theory is left to the discretion of the school board.

**Distribution of Religious Materials**

Public school personnel are not permitted to distribute religious materials on school premises. Such practice would be a clear violation of the Establishment Clause. Public school officials also may not allow religious groups to distribute religious materials on school grounds. Support of such practices would suggest that the school embraces religion and could suggest preference of one religion over another. Again, the principle of neutrality demands that schools assume a neutral position, neither supporting religion nor prohibiting individual students from exercising their religious rights. Two cases illustrate the courts’ posture regarding the distribution of religious materials.

One case involving the distribution of religious material arose in Florida when an elementary school student brought religious pamphlets to distribute to her classmates. The school district’s policy vested the superintendent with power to restrain the distribution of any materials unrelated to school courses in the public schools. When the elementary student requested, through her teacher, to be allowed to distribute the pamphlets, they were confiscated and carried to the principal, who subsequently destroyed them, indicating that he could not permit the distribution of religious material at school.

The student and her mother filed suit in the U.S. district court, seeking a preliminary injunction against enforcement of the policy. The court held that the motion was premature and that the policy had never been applied by the school. The Eleventh Circuit Court affirmed the district court’s decision. The district court then addressed the student’s request for a permanent injunction against enforcing the policy. The court discerned that the policy was a content-based prior restraint ban on free speech that could be justified only with a showing that the literature would materially or substantially disrupt the operations of the school or infringe on the rights of other students.
In the absence of this showing, the school district’s policy, as expected, could not be supported under the law. The First Amendment to the U.S. Constitution prohibits the government from inhibiting the free exercise of religion. There was no evidence that the distribution of the religious pamphlets interfered materially or substantially with school operations. The court held for the student by issuing a permanent injunction against the enforcement of the policy and also awarded nominal damages and attorney fees.77

The other leading case, Tudor v. Board of Education,78 arose in New Jersey, where the highest state court struck down an attempt by Gideons International to distribute the Gideon Bible throughout the public schools. Distribution of the Bible was expressly approved by the board of education. Approval was based on parental requests that Bibles be distributed to their children. The court, in assessing this practice, determined that the Gideon Bible was sectarian, based on testimony of representatives of various faiths, many of whom did not accept part or all of the Gideon Bible. The court also considered testimony from psychologists and educators who affirmed that the distribution of permission slips for parental consent would create subtle pressure on all children to accept the slips. Furthermore, the distribution of the Bible, as embraced by the school, would signify that school officials had given the Bible their stamp of approval, thus creating increased tension among other religious groups.

The court, in its ruling, found the practice to be unconstitutional in that it showed preference of one religion over others, thus violating the Establishment Clause. The Fifth Circuit Court of Appeals unanimously agreed with the New Jersey district court’s ruling in the related Meltzer v. Board of Public Instruction of Orange County.79

In yet another case involving the distribution of the Bible, a Nebraska school board member withdrew his son from school and resigned from his position on the board when his son was given a Gideon Bible in the school’s hallway. The distribution was clearly in violation of unwritten district policy, which permitted distribution of Bibles to fifth-graders on the sidewalk and off school premises once per year. The school employed an open forum policy, which made sidewalks available to any group after school hours. The facts revealed that distribution was voluntary, as students were reminded over the school’s public address system that they were not required to accept a Bible. On the following day, students received Bibles in the hallway. Although there was no evidence that the district played any role in this activity, the board member filed suit in the U.S. district court under 42 U.S.C. § 1983.

The court held that the district played no role in the hallway distribution and that its open forum was valid because it had a neutral purpose that neither advanced nor inhibited religious groups. It further noted that no groups had ever been denied access to the sidewalk and that no district resources were involved. The court granted summary judgment for the district.80

Pledge of Allegiance

LANDMARK CASE. A landmark case challenging the daily ritual of reciting the Pledge of Allegiance emerged in the Ninth Circuit Court in California regarding the constitutionality of the inclusion of the words under God. The final outcome of the ruling in this case has had a profound effect on public schools, on state and federal governments, and on U.S. citizens in general. Forty-nine states have filed briefs supporting the Pledge of Allegiance.

This case arose when Michael R. Newdow, an atheist, filed a suit on behalf of his eight-year-old daughter challenging the inclusion of under God in the pledge. A panel of the U.S. Court of Appeals for the Ninth Circuit in San Francisco created quite a controversy when it ruled 2–1 that the inclusion of under God was an unconstitutional establishment of religion by the government.

Although Newdow does not have legal custody of his daughter, the court held that he has legal standing to raise the challenge on behalf of his daughter, who has not been named in court papers. The defendants are the Elk Grove Unified School District, the State of California,
the U.S. Congress, and President George W. Bush. The eight-year-old girl’s mother, Sandra Banning, has publicly confirmed that her daughter has no religious objection to reciting the pledge in school. Newdow and Banning, the child’s parents, have never been married. Both held informal custody of their daughter until February 2003, after which time sole custody was awarded to Ms. Banning. A California Superior Court barred Newdow from naming his daughter as defendant.

U.S. Circuit Judge Alfred T. Goodwin wrote the original opinion against the constitutionality of the pledge and also stated that the mother had no power as sole legal custodian to insist that her child be subjected to unconstitutional state action. U.S. Circuit Judge Ferdinand F. Fernandez, who dissented, agreed only on the issue of legal standing. Subsequently, a larger panel of Ninth Circuit judges heard this case and supported the decision of the three-judge panel. This case has been appealed to the Supreme Court.

The George W. Bush administration defended the words under God in the Pledge of Allegiance and asked the Supreme Court to uphold the daily recitation of the pledge. The administration’s rationale was that reciting the Pledge of Allegiance is a patriotic exercise and not a religious testimonial. In addition, the administration said that the reference to “one nation under God” in the Pledge of Allegiance is an official acknowledgment of what all students may properly be taught in school regardless of their religious affiliation. Jay Sekulow, chief counsel of the American Center for Law, filed court appeal or court papers on behalf of members of Congress.

On June 14, 2004, the U.S. Supreme Court overturned the Ninth Circuit Court’s decision on technical grounds and preserved the contested phrase “one nation under God” in the Pledge of Allegiance. The Supreme Court ruled that Newdow, the plaintiff, had no legal standing to challenge the pledge because he was not the custodial parent of his then ten-year-old daughter and could not legally represent her. This ruling failed to address whether the inclusion of the reference to God was an impermissible practice involving an unconstitutional blending of church and state. Consequently, the U.S. Supreme Court’s ruling did not prevent a future lawsuit challenging the inclusion of the phrase “one nation under God” in the pledge. In fact, another challenge has emerged by Newdow and others who oppose the Pledge of Allegiance.81

Interestingly, a federal judge in San Francisco has held subsequent to Newdow’s initial challenge that reciting the Pledge of Allegiance in public schools is unconstitutional. The case, identical to his earlier challenge, was brought by Newdow but this time on behalf of three unnamed parents and their children. U.S. District Judge Lawrence Karlton ruled that this pledge’s reference to “one nation under God” violates students’ right to be “free from a coercive requirement to affirm God.” Judge Karlton indicated that he was bound by the precedent established by the Ninth U.S. Circuit Court of Appeals, which ruled in favor of Newdow in 2002 by holding that the pledge is unconstitutional when recited in public schools.

Karlton issued an order preventing the reciting of the pledge at Elk Grove Unified School District, Rio Linda, and Elverta joint elementary school districts in Sacramento County where the plaintiffs’ children attend school. The judge’s order will not extend beyond these districts unless affirmed by a higher court, at which time the ruling would be extended to the nine states within the Ninth Circuit. At least for now, millions of schoolchildren who desire to do so may continue to recite the Pledge of Allegiance in public schools because the U.S. Supreme Court decision in the West Virginia State Board of Education v. Barnette case in 1943 held that public school officials may not require students to salute and pledge allegiance to the flag.82 These activities must be strictly voluntary.

Although it is difficult to predict the outcome of this case, it appears that the U.S. Supreme Court may presumably address criteria similar to those used in the Lemon case:

Does the pledge have a secular purpose?

Does it advance or inhibit religion?

Does it create excessive entanglement?
In addition, the court may likely consider that reciting the pledge is optional, as decided in 1943 in *West Virginia State Board of Education v. Barnette*, in which the U.S. Supreme Court held that public school officials may not require students to salute and pledge allegiance to the flag. After the events of September 11, 2001, the United States has become strongly united around patriotism, which will no doubt have some impact on the ultimate ruling. Added to these developments is the fact that *In God We Trust*, found on U.S. coins, has been held to be a national slogan and not the government’s endorsement of religion. It will be interesting to observe the outcome and impact of this case. However, in a recent decision, a federal appeals court in the Ninth District upheld the use of the words *under God* in the Pledge of Allegiance as well as *In God We Trust* on U.S. currency. The court rejected arguments that these phrases violate the separation of church and state. The Ninth Circuit Court of Appeals decision was a response to Michael Newdow’s claim that these references to God were unconstitutional and infringed on his religious beliefs. Religious issues continue to invoke conflict and highly charged emotional responses as reflected by the volume and diversity of litigation surrounding religion. Issues involving religion remain unsettled. Consequently, absolutes are difficult to identify.

### Administrative Guide

#### Religious Activities

1. School-sponsored holiday programs are permitted if they are not conducted in a religious atmosphere.
2. Released time for religious instruction may be allowed if evidence reveals that no public school resources are involved. Use of public school resources violates the Establishment Clause of the First Amendment.
3. School districts may find it difficult to justify the posting of the Ten Commandments or other references to God as meeting a purely secular purpose.
4. Religious pageants, displays, or symbols will not meet the constitutional requirements of neutrality by school officials. Statues or pictures may be used to teach art forms if taught as a secular activity.
5. The distribution of religious material by external groups is illegal if the distribution occurs on school premises. However, a student may be allowed to distribute religious pamphlets if the distribution does not interfere with normal school activities or create material or substantial disruption.
6. School authorities must respect the free exercise rights of students, unless the exercise of those rights violates the rights of others or disrupts the educational process.
7. School authorities must refrain from any activity that would create an unclear line of separation between school activities and religious activities.
8. School authorities should consult the district’s legal counsel regarding any questionable religious activities in their schools.
9. Aid to students attending religious school in the form of computers and equipment is permissible as part of a general program designed to enhance overall educational opportunities of all students.
10. Students may not be compelled to recite the Pledge of Allegiance based on their right to freedom of expression.

### RELIGIOUS FREEDOMS INVOLVING TEACHERS

The First Amendment guarantees religious freedom to all citizens. Title VII of the Civil Rights Act of 1964 further prohibits any forms of discrimination based on religion. Therefore, it is unlawful for a school district to deny employment, dismiss, or fail to renew a teacher’s contract based on religious grounds. Teachers, like all citizens, possess religious rights that must be respected. As with all rights, religious rights are not without limits. Because teachers are public employees and schools must remain neutral in all matters regarding religion, reasonable restraints
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affect the exercise of religious rights in the school setting. However, teachers are completely free to fully exercise their religious rights outside of normal school activities.

For example, teachers may not refuse to teach certain aspects of the state-approved curriculum based on religious objections or beliefs. Although the courts recognize the existence of the teacher’s religious rights, they also recognize the compelling state interest in educating all children. One court held that education “cannot be left to individual teachers to teach the way they please.” Teachers have no constitutional right to require others to submit to their views and to forgo a portion of their education they would otherwise be entitled to enjoy. In short, teachers cannot subject others, particularly students, to their religious beliefs or ideologies; they, too, must remain neutral in their relationship with students.

Religious Rights of Teachers in the School Environment

Based on the free exercise of religion, it is reasonable to conclude that teachers should be afforded the right to informally engage in religious speech with their colleagues, including prayer or Bible study, at times when teachers are allowed to meet with their colleagues for other forms of expression. However, no organized prayer meetings, informal religious speech, or Bible discussion should occur. These should be activities protected by the free speech clause as long as they occur in a private area where students cannot observe or participate in them. Such activities ideally should occur before or after school. It is difficult to determine precisely how the courts would view these activities, because this issue has very rarely been presented to the courts.

In one of the rare cases involving the use of school facilities by teachers for religious meetings, a teacher brought suit against the school board, its members, and the superintendent, seeking an injunction against banning religious meetings by teachers on school property. The U.S. District Court for the Southern District of Indiana granted the school district a motion for summary judgment. The teacher appealed. The court of appeals held that teachers had no right under the First Amendment free speech clause to hold prayer meetings on school property before students arrived and the school day began. The court observed further that school officials had consistently applied a policy prohibiting the use of school facilities for religious activity. The teacher contended that the school was an open forum in that it was used for meetings on other subjects. The court found her claim to be clearly erroneous. Teachers generally should have a right to express themselves to other teachers while on school property during noninstructional times as long as students are not involved and the expression only involves willing teachers. Teachers should be cautious that their speech is not construed as harassment of another teacher who does not wish to be involved in these discussions. Therefore, willing parties would be important in this instance. As previously stated, this issue has not been decided conclusively by courts; however, it appears that the First Amendment should provide some degree of protection to teachers regarding their right to express personal views on religion in conversation with their peers, just as they would on other topics. Until these issues are addressed by the courts, it is difficult to determine precisely how the courts might rule.

Use of Religious Garb by Teachers

The wearing of religious garb by public school teachers has created legal questions regarding freedom of expression rights versus religious violations based on dress. It has been well established that public school districts may not legally deny employment opportunities to teachers based on their religious beliefs or affiliation. However, the wearing of religious garb by public school teachers raises the issue of whether such dress creates a sectarian influence in the classroom.

Many state statutes prohibit public school teachers from wearing religious garb in the classroom. Some legal experts believe that the mere presence of religious dress serves as a constant reminder of the teacher’s religious orientation and could have a proselytizing effect on children, because they are impressionable, particularly those in the lower grades.
Conversely, public school teachers advance the argument that religious dress is a protected right regarding freedom of expression. The courts, however, have clearly established the position that the exercise of one person’s rights may not infringe on the rights of others and that public interest supersedes individual interests. Further, prohibiting a teacher from wearing religious dress does not adversely affect the teacher’s belief. It merely means that teachers cannot exercise their beliefs through dress during the period of the day in which they are employed. There is no interference outside the school day. Thus, a teacher is free to exercise full religious rights and freedoms outside normal hours of employment. The courts have not reached total consensus on this issue, as can be discerned through the following analysis.

In a significant case, the Pennsylvania Supreme Court supported the authority of a local board of education to employ nuns as teachers and to permit them to dress in the custom of their order. Subsequent to the Pennsylvania decision, the legislature enacted a statute prohibiting the wearing of any religious dress as insignia by public school teachers representing any religious order. The constitutional validity of this statute was upheld by the Pennsylvania Supreme Court, noting that the law was not passed against belief but rather against acts as teachers in performing their duties.

Another court disqualified all nuns from teaching in public schools on the grounds that their lives were dedicated to teaching religion. Recent court interpretations seem to suggest that religious dress that creates a reverent atmosphere and may have the potential to proselytize, thereby creating a sufficient sectarian influence, violates the First Amendment neutrality clause.

A related case involving free speech and religion arose in Pennsylvania. A teacher at an intermediate school was suspended for wearing a cross on a necklace to school. The Pennsylvania legislature passed a “religious garb law” that prohibited teachers from wearing religious clothing to public schools. Brenda Nichol was suspended after being informed by her principal that wearing the cross in a visible manner violated school policy. She subsequently filed a suit claiming that the policy violated her rights because jewelry containing religious symbols was banned whereas other jewelry was not.

The district court agreed and held that the school district had engaged in viewpoint discrimination that could not be justified as serving a compelling state interest. The court relied on the U.S. Supreme Court’s reasoning in Good News Club v. Milford Central School that religious-based restrictions on expression of speech demonstrate hostility toward religion and violate the principle of neutrality. The court rejected the district’s claim that impressionable young children would be indoctrinated by the presence of the religious necklace. The court held that Ms. Nichol’s subdued expression of her religious faith outweighed the district’s concern.

### Administrative Guide

**Religious Freedoms**

1. Wearing of religious garb by teachers may be disallowed if their dress creates a reverent atmosphere or has a proselytizing impact on students.
2. The religious rights of teachers must be respected, as long as they do not violate the Establishment Clause of the First Amendment by creating excessive entanglement in the school.
3. School officials must make reasonable accommodations for teachers regarding observance of special religious holidays, as long as such accommodations are not deemed excessive or disruptive to the educational process.
4. Teachers should not be coerced to participate in nonacademic ceremonies or activities that violate their religious beliefs or convictions.
5. In cases involving the performance of their nonacademic duties, teachers may be requested to present documentable evidence that a religious belief or right is violated.
6. No form of religious discrimination may be used to influence decisions regarding employment, promotion, salary increments, transfers, demotions, or dismissals.
CASE STUDIES

Teachers and Devotional Activities
You are a principal of a vibrant school located in an industrial city of 300,000 people. It has been reported that a group of your teachers are holding devotional activities in the teacher’s lounge during their break.

Discussion Questions
1. How do you respond to this news?
2. Is it permissible for teachers to hold devotional activities during school hours on school premises? Why? Why not?
3. What action, if any, would you take?
4. How do you think the courts would view this practice in the context of the Establishment Clause?
5. How do you think the courts would view your decision?
6. What is the basis for your response?

Religion and Student Expression
Jean Riley is the principal of a small elementary school in a metropolitan school district. One of her best teachers asked her first-graders to make a poster depicting things for which they were thankful. One student made a poster expressing thanks for Jesus. Posters were displayed in the school’s hallway. The student’s poster was removed but later returned in a less prominent place. The next year, the student was chosen to read a story to the class. The student selected an adaptation of a biblical story.

Discussion Questions
1. Should the student be permitted to read his biblical story? Why or why not?
2. What is the legal issue surrounding both the poster and the biblical story?
3. What legal risks does the school incur (if any) if it permits both of these activities?
4. What legal risks does the school incur if it denies both of these practices?
5. How would the courts likely rule on this case? Provide a rationale for your response.

Use of Facilities by Religious Groups
Gayle Dixon is the principal of a midsize, progressive, metropolitan high school located in the Mid-South. The school maintains an open forum, thereby allowing noncurricular groups to use facilities during noninstructional times, including student religious groups. A Bible club has requested the use of school facilities, but Dixon learned that the club’s charter allows only Christians to be club officers. In her mind, this provision of the charter is discriminatory. Based on this provision, she rejected the club’s request to use school facilities. The club filed suit.

Discussion Questions
1. Does the club have legitimate grounds to file suit? Why or why not?
2. Is Dixon justified in rejecting the club’s request to use school facilities? Why or why not?
3. Does the Bible club have the right to specify that only Christians be club officers? Why or why not?
4. If you were the principal, would you handle this situation any differently?
5. How do you think the court would rule in this case? Provide a rationale for your response.
6. What are the administrative implications of this case?

Use of Facilities by the Community
A midwestern school district approved a policy allowing open access to its facilities by the public as long as public use did not interfere with school activities. The community has a history
of deep religious convictions. A group of graduating seniors and their parents arranged for a baccalaureate ceremony sponsored by the community. The ceremony was to be held in a school gymnasium. Verbal authorization was granted by school district officials. One month later, the district approved a new policy, which prohibited the group from using the gym.

Discussion Questions

1. Does the board’s action constitute a breach of duty to honor its verbal authorization? Why or why not?
2. Does the district have a right to change its policies after giving verbal authorization for use of the gym? Why or why not?
3. Does the district’s action amount to a breach? Why or why not?
4. What is the legality of reversing a policy that has been approved and executed for an extended period of time?
5. Would the district’s action constitute discrimination against the students, their parents, and the community?
6. What might the district’s defense be in this situation?
7. How would the court likely rule on this issue? Provide a rationale for your response.
8. What are the administrative implications?

Note: The board is the legal body for the district.
Student Response Sheet

Professor ___________________________ Student ___________________________
Course ___________________________ Date ___________________________
Title of In-Basket Exercise ___________________________

Reaction:

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________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
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________________________________________________________________________
Endnotes

5. Source: First Amendment Center.
18. Santa Fe, op. cit.
19. Ibid.
42. Weinbaum v. City of Las Cruceds, New Mexico, 541 F.3d 1017 (19th Cir. 2008).
44. Washesegic v. Bloomingdale Public Schools, 33 F.3d 697 (6th Cir. 1994).
61. Burnette v. Whitehead, 580 F.3d 1087 (9th Cir. 2009).
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64. Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981).
75. Lemon v. Kurtzman, op. cit.
83. Ibid.
84. Palmer v. Board of Education of the City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979), cert. denied, 444 U.S. 1026, 100 S.Ct. 689 (1980).
85. May v. Evansville, 787 F.2d 1105 (97th Cir. 1986).
88. Harfst v. Hoegen, 349 Mo. 808, 163 S.W. 3d 609.