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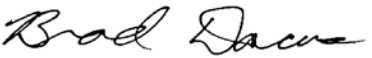
An Open Letter to Parents, Teachers, Administrators and School Boards

We at the Pacific Justice Institute are dedicated to the protection of religious freedom, parental rights, and other civil liberties. Since our founding in 1997, we have assisted thousands of parents, students, teachers, and school administrators with a wide range of issues involving civil rights in public education.

As someone concerned with the public school system, you may have questions about how the religious freedom rights of students relate to the so-called "separation of church and state." Or you may be interested in what rights parents have with respect to their child's education. This booklet will provide you with important information about thirteen critical issues confronting public education today. From Bible clubs to confidential medical release, from prayer on campus to tolerance of students' political and religious beliefs in the classroom, we have designed this resource to clarify the important legal rights and responsibilities of parents, students, teachers and school administrators in public education.

If you have any questions about the information presented in this booklet, or would like to inquire about receiving legal assistance, please do not hesitate to contact the Pacific Justice Institute toll free at 888-305-9129.

Sincerely,



Brad Dacus, President

I

Students have a right to start Bible/Christian clubs on campus

We are aware that many school administrators fear that allowing a Christian club on campus violates the "separation of church and state." In contemporary society, there is a great deal of confusion about the meaning and legal authority of this phrase.

Contrary to popular belief, the United States Supreme Court has never insisted that there be an impenetrable wall between church and state.[1] Although separation of church and state is important in certain contexts, the Court has never thought it either possible or desirable to enforce a government regime of total separation in order to comply with the First Amendment's Establishment Clause.[2] Moreover, the "[wall of separation] metaphor…is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[3]

As a matter of law, the Constitution "affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any."[4] Therefore, limiting the existence or religious expression of a Christian Club based on a fear of violating the separation of church and state is clearly mislaid.

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[1] *See Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).
[2] *See Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).
[3] *Lynch v. Donnelly*, 456 U.S. 668, 673 (1984).
[4] *Id*. [citations omitted][emphasis added].

Over thirty years ago, the United States Supreme Court decided *Tinker v. Des Moines School District.* This case involved several students who had been unconstitutionally suspended from school for wearing black armbands to class in protest of the war in Vietnam. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates," the Court noted.[5] Moreover, "students may not be regarded as closed circuit recipients of only that which the… [government]chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[6]

Religious speech also falls within the scope of the *Tinker* case. The Supreme Court has affirmatively established that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[7] Indeed, privately expressed religious speech may not be constitutionally suppressed, or discriminated against, by any agent of the state on the sole reason that the speech or expression contains religious content.[8] Such discrimination necessarily amounts to an unconstitutional act of state sponsored hostility toward religion.[9] And although religious-based speech can often be controversial and cause uneasiness among some people who hear or see it, such effects are an inadequate basis for

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[5] *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969).
[6] *Id*. at 511.
[7] *Capitol Square Review v. Pinette*, 515 U.S. 753, 760 (1995).
[8] *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Unions School Dist*., 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).
[9] *See, generally, Lynch*, 465 U.S. 668 (1984).

allowing a public school to prohibit student religious expression on campus during non-instructional hours.[10]

In addition to being constitutionally protected, the right of students to meet on campus during school non-instructional hours is protected by the Equal Access Act.[11] The Act generally provides that "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious…content of the speech at such meetings." If the school allows any non-curriculum groups to meet on campus, the Bible/Christian group must be afforded the same equal access as other non-curriculum groups.

Within the context of the federal Equal Access Act, the Supreme Court has defined "non curriculum student groups" as "any student group that does not directly relate to the body of courses offered by the school."[12] More specifically, "a student group directly relates to a school's curriculum (1) if the subject matter of the group is actually taught, or will be taught, in a regularly offered course; (2) if the subject matter of the group concerns the body of courses as a whole; (3) if participation in the group is required for a particular course; or (4) if participation in the group results in academic credit."[13]

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[10] *See, e.g., Tinker, supra* n. 6, at 509 ["In order for the State in the person of school officials to justify prohibition of a particular expression or opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular point of view (underline added)."]

[11] 20 U.S.C. §4071 (2004).

[12] *Westside Community Board of Education v. Mergens*, 496 U.S. 226, 239-40 (1990).

[13] *Id*. at 239-40.

Applying these criteria, the Court has summarily rejected the assertion that certain student groups like the Chess Club and National Honor Society were curriculum related, while a Christian Bible Club was not. Simply because particular student clubs might advance the "overall goal of developing effective citizens…enable students to develop lifelong recreational interests…[and] enhance students' abilities to engage in critical thought processes," does not, the Court held, make them sufficiently related to a school's curriculum so that application of the Equal Access Act may be avoided.[14]

Additionally, based upon these criteria, student groups and clubs like Key Club, Honor Society, and Student Council are considered non-curriculum related.[15] If groups like these are allowed to meet on campus during school instructional hours, the school is under a legal obligation to afford the same, or similar, accommodations to a Bible/Christian club. Such an accommodation cannot be legally denied.

II

Students can share their faith on campus

The Supreme Court has ruled that student speech is protected by the First Amendment as long as the speech is not

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[14] *Id*. at 244; *See, also, Van Schoick v. Saddleback Valley Unified School District*, 87 Cal. App.4th 522, 529 (2001).

[15] *See, e.g., Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1252 (3rd Cir. 1993)[the asserted historical/humanitarian subject matter of community service clubs, like the Key Club, is insufficient to make them curriculum related groups]; *Van Schoick, supra*, at 530 [school district requiring eight hours of community service for graduation does not make student community service groups like the Key Club or Girls League curriculum related.]

a material or substantial disruption.[16] This means that when students are outside of class they can share their faith with friends or other students. Student speech can only be restricted when it substantially interferes with school discipline.[17] Interference, however, does not include some students finding the speech offensive; mere discomfort at the subject matter is not sufficient to restrict student speech.[18]

A. Right to use evangelistic material when witnessing

It is generally recognized that high school students can distribute religious materials containing Bible verses.[19] Students can also use religious tracts when they share their faith because tracts and other evangelism materials constitute constitutionally protected speech.[20] As such, the First Amendment protects a student's right to distribute religious materials on campus.[21] Religious literature is considered pure speech, and "students are protected by the U.S. Constitution in the school environment. Prohibitions of pure speech can be supported only when they are necessary to protect the work of the schools or the rights of other students."[22]

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[16] *Tinker*, *supra* n. 6, 393 U.S. 503.
[17] *Id.* at 508-509.
[18] *Id.* at 509.
[19] *Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989).
[20] *Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640 (1981); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Cf. Widmar v. Vincent*, 454 U.S. 263, 269 (1981).
[21] *Rivera*, *supra* n. 21, 721 F. Supp. 1189; *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987); *Nelson v. Moline School District No. 40*, 725 F. Supp. 965 (C.D. Ill. 1989); *Henry v. School Board of Colorado Springs School District 11*, 760 F. Supp. 856 (D. Colo. 1991). *See also Hedges v. Wauconda Community Unit School District No. 118*, 9 F.3d 1295 (7th Cir. 1993) (overturning discriminatory ban on student distribution of religious literature).
[22] *Rivera*, *supra* n. 21, 721 F. Supp. 1189 (D. Colo. 1989).

In fact, a school cannot even require students to give advance notice when they plan to leaflet.[23] Schools also lack the power to restrict students to a certain area when passing out religious materials, unless the students are disrupting school discipline.[24]

B. Right to speak during non-instruction time about a religious topic

If a school allows any students to speak publicly on campus about non-curriculum issues, the school cannot prohibit students from speaking about religion because it would be a violation of the Equal Access Act and Supreme Court precedent.[25] Because they are agencies of the government, public schools must also ensure that they do not impose overly broad or arbitrary speech regulations on students. In other words, any school action or school district policy that has an impact on student speech must not be applicable to constitutionally protected expression.[26] If a school allows any club to put on skits, have a band perform, or other lunchtime presentations, then the school must also give a faith-based club these same rights.

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[23] *Thomas v. Collins*, 322 U.S. 516, 540 (1945); *Burch v. Barker*, 861 F.2d 1149, 1157 (9th Cir. 1988).

[24] *Johnston-Loehmer v. O'Brien*, 859 F. Supp. 575.

[25] *See, e.g., Prince v. Jacoby*, 303 F.3d 1074, 1087 (9th Cir. 2002) ["While the school is certainly permitted to maintain order and discipline in the school hallways and classrooms by limiting the number and manner of both printed and oral announcements for all student groups, 20 U.S.C. §4071(f), it may not discriminate among students based on the religious content of [their] expression…"] and *Rosenberger v. Rectors and the Univ. of Virginia*, 515 U.S. 819, 828-829 (1995) ["It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys…The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."]

[26] *See, e.g.,Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

III

Students can pray on campus

A student has the right to engage in personal prayer on a public school campus.[27] Contrary to popular belief, students are not even forbidden from engaging in *public prayer* at school. Moreover, students can gather and pray on school property before the school day officially begins.[28] High school students can engage in voluntary group prayer, and elementary students can participate in group prayer with parental consent.[29] Thus, schools cannot deprive students of this right by refusing to allow student organized meetings.[30] "See You at the Pole" is an example of a student-led, student-initiated movement of prayer held annually on a national scale.

A. Personal Prayer at Public School

The right to engage in personal prayer in a public place is guaranteed by the Free Exercise Clause of the First Amendment. The Constitution does not "prohibit any public school student from voluntarily praying at any time before, during, or after the school day."[31] Thus a student is free to bow his head and pray over his food at lunch, before a test, or during free time (such as study hall or recess).

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[27] *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).
[28] *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 589-590 (N.D. Miss). (1996).
[29] *Id.*
[30] *Daugherty v. Vanguard Charter Academy*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000).
[31] *Santa Fe Independent Sch. Dist.*, 530 U.S. at 313 (2000).

B. Student-Initiated Group Prayer at Public School

The Constitution's recognition of personal prayer in school extends beyond silent prayer. Prayer that is spoken aloud or occurs in front of others is also protected by the First Amendment.[32] In order for a prayer to be considered private speech and therefore protected by the Constitution, it must be genuinely student-initiated and voluntary.[33] A prayer can be spoken aloud among a group of students as long as it does not "materially disrupt" the learning environment.[34] These private, vocal prayers can occur in the midst of an audience assembled for some other purpose.[35] For example, an individual student or a group of students can pray aloud during a school sporting event provided that the prayer does not materially disrupt the operation of the school.

In summary, vocal or silent prayer that is initiated by students and does not have the appearance of school endorsement is protected by the Constitution.

IV

Students can take their Bibles to school

A. Taking a Bible to school for use during non-curricular times

In *Breen v Runkel,*[36] a federal court upheld the constitutionality of the activities of public school students

[32] *Chandler, supra* 230 F.3d at 1317.
[33] *Id.*
[34] *Tinker, supra* n. 6., 393 U.S. at 509.
[35] *Chandler, supra* 230 F.3d at 1317.
[36] *Breen v. Runkl,* 614 F Supp 355 (1985, W.D. Mich.).

who attended lunchtime Bible meetings. These Bible meetings occurred during a non-curriculum part of the school day and did not disrupt the educational environment or infringe on the rights of fellow students. If students are allowed to attend such lunchtime Bible meetings, then they are allowed to take a Bible to school and read it during other non-curricular times of the day (recess, free time, etc.).

The First Amendment of the Constitution ensures the right to free speech, which includes the right of religious expression.[37] Moreover, the Supreme Court requires that school officials recognize students' constitutional rights in the school setting.[38] The school setting includes not only the classroom, but also the lunchroom, playing field, school yard, and hallways.[39] As a result, students are entitled to freely express their religious views by reading their Bible during the school day, insofar as a student's decision to read the Bible in school is an expression of their religious freedom.

In order for a school to prohibit a student from reading the Bible during non-curriculum time, the school must show that the restriction was motivated by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[40] The school must show that the student's reading of the Bible "materially and substantially interferes" with the operation of the school or invades the rights of others.[41]

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[37] *Widmar, supra* n. 9, 454 U.S. at 269.
[38] *Tinker, supra* n. 6, 393 U.S. at 506.
[39] *Id.* at 512-513.
[40] *Id.* at 509
[41] *Id.*

B. Taking a Bible to school for use during class time

If the student's personal Bible reading occurs during class or other curricular time, the government has some limited authority to restrict the activity.

Many schools have begun to implement a silent reading period at some point during the school day. During this period, the teacher sets aside time for students to read a book of their choosing. Because it occurs in the classroom and is specifically designed to improve reading skills, schools may argue that the silent reading period is a curricular activity.

However, courts have yet to determine the exact classification of these silent reading periods. If they occur during non-curricular time, students should absolutely be able to read their Bible as long as they do not "materially disrupt" the operation of the school. Even if these silent reading periods are classified as curricular, students may nonetheless be permitted to read their Bible if the school's silent reading policy allows students to read any *historical* or *educational* literature, or otherwise gives pupils discretion to read whatever they please. The school cannot restrict a student from reading the Bible while allowing all other literature.[42] Such viewpoint restrictions on reading material would be evidence of a clear hostility toward religion, which is forbidden.[43]

Discriminatory policies by schools which prevent students from reading the Bible would be an infringement on the student's religious expression. In order to justify even a content-based discrimination, the school must have a compelling state interest and the policy must be narrowly

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[42] *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).
[43] *Zorach v. Clauson*, 343 U.S. 308, 314 (1952).

designed to achieve only that interest.[44] In the absence of such a compelling interest, the school cannot restrict a student's personal Bible reading, even during a silent reading period.

In addition, school officials cannot entirely ban study of the Bible from public school curriculum. For example, the Bible can be part of a public school course as long as it is taught from a secular, educational point of view.[45] Courts have also held that the Bible has a legitimate place in public school libraries.[46]

V

Students can write papers and speak on Christian topics as class assignments

According to the U.S. Department of Education guidelines on religious expression in class assignments:

> "Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards

[44] *Widmar, supra* n. 9, 454 U.S. at 269-270.
[45] *Stone v. Graham*, 449 U.S. 39, 42 (1980)
[46] *Roberts v. Madigan*, 702 F.Supp. 1505, 1512 (D. Colo. 1989).

(such as literary quality) and neither penalized nor rewarded on account of its religious content."[47]

Based on this standard, a student's work should not be rejected merely because the student expresses a religious viewpoint in the assignment. Teachers cannot prohibit student expression in a discriminatory fashion.

VI

Schools can be used for religious purposes outside of school hours

If a school allows any outside groups to use school grounds, then the school must also allow religious groups to use the campus. In a recent Supreme Court case a religious group wanted to use school grounds for "a fun time of singing songs, hearing a Bible lesson and memorizing scripture, and religious worship."[48] Even though the Court felt the content was "quintessentially religious" and "decidedly religious in nature," it still held that the religious speech could not be excluded.[49] The school defended its policy by claiming that allowing a religious group on school grounds violated the Establishment Clause, but the Court held that "[T]he guarantee of neutrality is respected, not offended, when the Government, following neutral criteria

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[47] *See* Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools. Found at www.ed.gov, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law. Dated February 7, 2003.

[48] *Good News Club, supra* n. 9, 533 U.S. 98.

[49] *Id.*

and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[50]

This school also contended that because they had elementary school children on campus, they had a higher duty to protect impressionable young children from a perceived government endorsement of religion. The Court rejected this argument, however, finding that the Establishment Clause does not prohibit "private religious conduct during nonschool hours merely because it takes place on school premises."[51] The Court also found that the danger of students misperceiving the religious event as one which the school sponsored was no greater threat than students perceiving religious hostility if the school did not allow the event.[52]

In another Supreme Court case, a private religious group wanted to use school grounds to present religious films.[53] The Court held that as long as the films were shown during nonschool hours, were open to the public, and the event was not sponsored by the school, there was no danger that the district would be perceived as endorsing religion.[54] Courts have also held that literature advertising these types of religious programs can be distributed throughout the school.[55] If the school passes out fliers for secular activities then it cannot refuse to pass out similar fliers for religious events.[56]

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Lamb's Chapel, supra* n. 9., 508 U.S. 384.
[54] *Id.*
[55] *Hills v. Scottsdale Unified Sch. Dist*., 329 F.3d 1044 (9th Cir 2003).
[56] *Id.*

In general, once a school opens up their grounds for use by outside groups, or passes out information about outside groups, the school then cannot refuse to do the same for religious organizations.

Finally, the California legislature has passed the Civic Center Act which specifically provides that religious groups may rent school facilities and grounds for religious services and recreational activities. [57] School officials may not mandate or organize religious ceremonies. But if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies.

In addition, it is legal for students to pass out flyers about the baccalaureate as long as advertising efforts do not disrupt class. Of course elected officials and school employees are free to attend such services in their capacities as private citizens.

VII

[57] Cal.Educ.C. §38130, *et seq.*

Schools can acknowledge/celebrate religious holidays such as Christmas and Easter

A. Celebrating a Religious Holiday in School and the Classroom

Schools and teachers are often concerned that they will be impermissibly endorsing religion by sponsoring activities such as making Easter eggs, Hanukkah dreidels, displaying Christmas trees or performing Christmas musicals. In most cases, this concern is misplaced. It is constitutional for a public school to celebrate a religious holiday when there is a secular purpose to the celebration. For example, the use of calendars and seasonable displays recognizing a large variety of national, cultural, ethnic, and religious holidays has been upheld as serving the genuine secular purpose of broadening student understanding of, and respect for, various beliefs and customs.[58]

The fact that a particular religious holiday has become a significant secular tradition is also a permissible reason for celebrating that holiday. For example, a school Christmas musical production may include religious carols, so long as they are presented "in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday."[59] As a general matter, any Christmas musical program should also include secular Christmas carols such as "Rudolph the Red Nosed Reindeer" or "Jingle Bells."

[58] *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 909 (D. N.J. 1993).
[59] *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir. 1980).

Many cases have dealt with the issue of whether religious holiday symbols displayed in a classroom or school is permissible. For the last three decades, the answer has been "it depends." The classic example is the displaying of the nativity scene. Displaying the nativity scene with religious symbols from other religions or secular symbols is constitutional because doing so acknowledges secular aspects of the holiday. For example, placing the nativity scene alongside the Jewish menorah, Santa Claus, or a Christmas tree would be permissible because such a display sends the secular message of inclusion and the freedom of one to choose his or her own beliefs.[60]

Holidays are a large part of our nation's culture and tradition, and provide students an opportunity to learn about the various beliefs of different religions and ethnicities. Teachers and administrators should not completely shun recognizing those holidays out of a fear of offending non-religious students or a perceived "separation of church and state" concern. Finally, school administrators should offer opportunities for students who do not wish to take part in holiday celebrations to opt-out of those activities.

[60] *Sechler v. State College Area Sch. Dist.* , 121 F. Supp. 2d 439 (rejecting Establishment Clause challenge to "Winter Holidays" school display of various religious and secular items, such as various books, a Menorah, a Kwanzaa candelabra, a snowflake, etc., found to convey inclusive message rather than favoring one religion over others or favoring religion over non-religion).

VIII

School districts may determine confidential medical release policies

A. California Constitution and Education Code

Based on current laws, school districts have an option regarding whether or not to require parental consent before releasing students for confidential medical treatment. No law explicitly requires schools to allow students to leave campus for medical treatment without parental notification; instead, state law gives individual school districts vast discretionary power in setting policies for their schools.

According to California Education Code Section 46010.1, "school authorities *may* excuse any pupil from the school for the purpose of obtaining confidential medical services without the consent of the pupil's parent or guardian."[61] The use of the word *may* gives the district the option to require parental consent before releasing students during school time for medical treatment. Even the author of this section of the code did not believe his bill required schools to refrain from notifying parents of the student's absence. In a February 25, 1987, letter meant "to clarify [his] intent in sponsoring AB 1541," Assemblyman Seastrand admonished school superintendents to "be careful in your wording of the notification to parents that you do not confuse the intent of AB 1541 and lead them to believe that AB 1541 'mandates' school districts to maintain this practice of dismissal without [a] parent's consent." Instead the policy regarding "the release of children from school" is to be set "*according to the decision of the local school board*" (emphasis in original). The legislative intent of this section is to allow school

[61] Cal. Educ.C. § 46010.1 (2004)(italics added).

districts to decide, in their discretion, whether to notify parents about a student's medical absence or not. [62]

Article IX, § 14, of the California Constitution provides that the "Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established"[63] This broad power that allows school districts to create any policy that does not conflict with existing state law was then codified by the California Education Code.[64] The Legislature understands that local school districts "have diverse needs unique to their individual communities and programs."[65]

While the case of *American Academy of Pediatrics v. Lungren*[66] states that parental consent cannot be absolutely required before a minor may obtain an abortion or seek other medical treatment, this particular case is not directly on point. Rather, the issue here is whether a school has the option to require parental consent before releasing students to obtain confidential medical treatment during school hours. Although a minor may seek confidential medical treatment outside of school hours, schools are not required to allow such treatment during school hours, absent an emergency situation or parental consent.

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[62] It should be noted that this statute is not without considerable controversy. There have been conflicting opinions by two California Attorneys General. 04 Op. AG 112 (November 29, 2004), 66 Op. AG 244 (July 28, 1983). The position of Pacific Justice Institute is that Attorney General Opinions are not the law, and "are not controlling as to the meaning of a…statute." *Smith v. Municipal Court*, 167 Cal.App.2d 534, 539. These opinions generally carry great weight with the courts when they are *unchallenged*. *Id.* Since such is not the case with these opinions, the plain reading on the face of the statute is controlling and should be followed.

[63] Cal. Const. Art IX, § 14.

[64] Cal. Educ.C. §35160 (2004).

[65] Cal. Educ.C.§35160.1(a) (2004).

[66] *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

Numerous court cases have long held that parents enjoy a well-established legal right to make important decisions for their children. Because of the serious health and safety concerns involved in medical treatments, this right is not suspended during school hours and supplanted by a child's right to privacy. To allow minors an absolute right to leave school premises during school hours for medical treatment without parental consent would create a situation in which minors have a unique window of opportunity—school hours—in which to pursue medical treatment with potentially serious medical consequences without the knowledge, consent or advice of their parents. The ultimate responsibility for the minor's health, safety, and welfare should rest with the parents in these situations.

B. Liability of School Districts

If a school district does allow students to leave school premises for confidential medical treatment in non-emergency medical circumstances, the district may very well open itself up to substantial liability if it does not require parental consent. For example, if a minor girl is released for a non-emergency abortion procedure without parental consent and that procedure results in her serious injury or death, the girl or her parents may have a very strong claim against the school district. This claim would be based on the fact that the injury occurred during school hours and while the girl's health and safety was entrusted by her parents to the school district.

Statewide regulations require that a "pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school."[67] The California Supreme Court expressly *rejected* the contention

[67] 5 Cal. Code Reg. § 303 (2004).

that a school district's duty to supervise pupils "does not include any responsibility for assuring that pupils remain on the school premises during the school day." In fact, it ruled that a school district bears "the duty to exercise ordinary care to enforce th[is] rule" and may be held liable for injuries resulting from its failure to do so.[68] Thus, if a school district fails to exercise reasonable care when allowing a student to leave campus for confidential medical reasons, it may well open itself up to liability.

In addition to the potential liability a school district exposes itself to by allowing students to leave campus for confidential medical procedures, a school district completely exposes itself to liability when it provides transportation for students to attend these procedures. California Education Code states that a school district is responsible for student safety when, "such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises."[69] This means that if a teacher, school nurse, or other school official volunteers to drive a student to a medical appointment without parental consent, the school assumes all liability for that student's safety. Even if a school official is not driving, but the school chooses to make the arrangements for someone to drive the student to the medical appointment, the school still assumes full liability for that student's safety.

School districts are granted the option under California Education Code Section 46010.1 to require parental consent before releasing students for confidential medical treatment. Each district has the responsibility to consider all factors involved and to make a decision based on what is in the best interest of its students, their parents, and the district in

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[68] *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d 508, 514 (1978).
[69] Cal. Educ.C. §44808 (2004).

general. It is our recommendation that school districts choose to enact school board policies that support a parent's right to know what medical procedures their children have during school hours. Since a school district has the authority to require parental consent before allowing a student to leave campus for any reason, we advise that all school boards adopt a policy mandating parental consent for all student absences.

IX

Parents have the right to participate in decisions relating to the education of their children

California Education Codes recognize that parents have primary responsibility for the upbringing of their children, and clearly give parents the right to participate in any and all "decisions relating to the education" of their children.[70] Indeed, "Schools are the most democratic institutions in this country." [71] However, many parents are unaware of the opportunities available to them to influence the direction and policies of their child's school. If fully utilized, parents have the power to achieve what lawsuits and courts cannot in determining the outcome of their child's public school education.

The opportunities given to parents may be focused most effectively in two areas. First, parents and guardians have the right to *examine the curriculum materials,* including teacher's manuals, films, and other supplementary

[70] Educ.C. §51101(b)(G).
[71] Educ.C. §51101(b).

materials, of the class or classes in which their child is enrolled. Parents may then meet with their child's teacher and principal to discuss the presentation of this material to their child. Their examination of the curriculum and meeting with the teacher and principal extends to all subjects taught.

Second, parents and guardians should take advantage of the opportunity provided by law to monitor and influence the operation of the school. They can participate as a member of a *parent advisory committee, school site council, or site-based management leadership team.*[72] As a member of the school site counsel, parents may participate in the *selection of instructional materials* used in the classroom. In fact, "each district board shall…promote the involvement of parents and other members of the community in the selection of instructional materials."[73] To facilitate parental participation, these councils are encouraged to schedule a biannual open forum to inform other parents about current school issues and activities, and answer any questions. [74] Additionally, parents and guardians influence school policy by running for the school board –often the most effective route to influence school policies.

[72] Cal. Educ.C. §51101(a)(14).
[73] Cal. Educ.C. §60002.
[74] Cal. Educ.C. §51101(a)(14).

X

Parents can opt their children out of comprehensive sex education and HIV/AIDS prevention education.

According to the California Education Code, parents have the right to ensure "a school environment for their child that is safe and supportive of learning."[75] The California Supreme Court has stated that "[T]he aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming."[76]

Any activity that tends to isolate particular students, calls students names, or tells students that their religious beliefs are wrong, destroys any sense of a safe and welcoming school environment. The California Education Code goes on to state that teachers must "foster an environment that encourages pupils to realize their full potential and that is free from discriminatory attitudes, practices, events, or activities."[77] The highly sensitive nature of comprehensive sex education and HIV/AIDS prevention education creates a situation that needs to be addressed with great care by school administrators and teachers when planning curriculum or inviting guest speakers to the school.

Many times when a school invites guest speakers to discuss issues like homosexuality with students, although the stated motive is to promote tolerance, the speakers themselves are intolerant of those students whose religious

[75] Cal. Educ.C. §51101 (2004).
[76] *In re William G.*, 40 Cal.3d 550 (Cal. 1985).
[77] Cal. Educ.C. §233.5(b) (2004).

beliefs are incompatible with a homosexual lifestyle. This intolerance has manifested itself through the use of derogatory language such as *homophobe* or *bigot*, and has the effect of isolating and publicly identifying those students whose religious beliefs do not support a homosexual lifestyle. This isolation destroys the safe and supportive environment that parents have a right to ensure.

Additionally, it should also be noted that school districts are obliged to send out notices to parents if this type of presentation is to be given at least two weeks before the event. Moreover, the school district must notify parents if a guest speaker will make the presentation –as opposed to a member of the regular school staff– as well as the organization or affiliation of the speaker.[78]

To preserve the right of parents to ensure the safe and supportive environment required by the Education Code, parents have the specific right to opt their child out of comprehensive sex education classes, HIV/AIDS prevention education, and presentations made by guest speakers who discuss these topics and issues of sexual orientation.[79] Before making the decision to opt their child out of such classes and presentations, parents may examine the curriculum being used and meet with the instructor and principal to discuss the presentation of these topics to their child.

In fact, school districts *must advise* the parent or guardian that they may request in writing that their child *be excused from comprehensive sexual health education or*

[78] Cal. Educ.C. §51938(a)(2).
[79] It is crucial to note that this right will be waived if a written request to school authorities to opt-out a pupil is not submitted by the parent. Cal. Educ.C. §51938(a)(4).

HIV/AIDS prevention education. [80] (Please see center section for a copy of the *Opt-Out Form* to be filed with schools in California.) Please note that a copy of the opt out request should be *given to both the child's teacher and principal*, and must be *resubmitted at the beginning of every school year*. Parents may also want to send a copy via certified mail to the school. In addition, pupils cannot be subject to disciplinary action, academic penalty, or other sanction if the pupil is excused from the teaching of these subjects. Moreover, the school must provide an alternative educational activity. [81]

Additionally, parents should also be aware that their child need not participate in any anonymous, voluntary, or *confidential test, questionnaire, or survey on pupil health behaviors and risks*, if the school has received a written request from the pupil's parent or guardian excusing the pupil from participation. [82]

XI

School districts have the authority to regulate political expressions by teachers in the classroom

School districts have vast discretion when setting board policies regarding teacher speech in the classroom. Although it is clear that neither "students nor teachers shed their constitutional rights to freedom of speech or expression at the

[80] Cal. Educ.C. §51938(a)(4).
[81] Cal. Educ.C. §51939(b).
[82] Cal. Educ.C. §51939(c).

schoolhouse gate,"[83] the California Education Code grants school districts the power to regulate political speech of teachers while they are in the classroom.[84] Unlike student speech, which can only be regulated when it causes a "material or substantial interference" with school discipline,[85] a teacher's political speech can be regulated even when passive.[86] In fact, a California Court of Appeal held that a school district could prohibit teachers from merely wearing buttons with a political message, even if the teachers never verbally said anything about them.[87] The court in that case stated that the Education Code clearly gave a school district the authority to regulate political speech by teachers during school hours.[88]

This means that local school boards and school districts can pass regulations that restrict teachers from engaging in political speech during class time. These regulations prevent impressionable students from being indoctrinated while at school. Teachers have "power and influence [while] within the classroom when they are engaged in teaching elementary and secondary school students."[89] The Court went on to say that "the very attributes of a successful teacher/student relationship make it reasonable for school authorities to conclude the only practical means of dissociating a school from political controversy is to prohibit teachers from

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[83] *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969); *Healy v. James*, 408 U.S. 169 (1972).
[84] Cal. Educ.C. § 7055 (2004)(stating the governing body of each local agency may establish rules and regulations on the following: (a) Officers and employees engaging in political activity during working hours. (b) Political activities on the premises of the local agency).
[85] *Tinker*, *supra* 393 U.S. 503.
[86] *CTA v. Governing Bd.*, 45 Cal.App.4th 1383 (4th Dist. 1996)
[87] *Id.*
[88] *Id.*
[89] *Id.*

engaging in political advocacy during instructional activities."[90]

Not only does a school district have the power to regulate an individual teacher's speech, but it is a clear violation of the California Education Code for teachers to "Engage in political or campaign activities during work hours."[91] Courts have held that posting or displaying political posters or other partisan materials in the classroom constitutes "campaign activity" prohibited by state law.[92]

Prohibitions on political speech in the classroom are especially important because, "a State may permissibly determine that, at least in some precisely delineated areas, a child —like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[93] In order to protect these students, school boards should pass specific regulations prohibiting politically biased speech by teachers in the classroom.

The following are examples of possible school board policies that allow teachers to exercise their free speech rights, while also protecting students from unrestricted indoctrination:

Proposed Policy: *The Board requires teachers to ensure that all sides of a controversial issue are impartially presented, with adequate and appropriate factual information. Without promoting any partisan point of view, the teacher shall help students separate fact from opinion*

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Ginsberg v. New York*, 390 U.S. 629, 649-650 (1968) (J. Brennan, concurring).

and warn pupils against drawing conclusions from insufficient data.

Proposed Policy: *Controversial issues may be discussed in the classroom, provided that. . .1.) All sides of the issue are given a proper hearing using established facts as primary evidence. . .2.) The teacher does not use his/her position to advance his/her own religious, political, economic or social views. The teacher may express a personal opinion if he/she identifies it as such and does not express the opinion for the purpose of persuading students to his/her point of view.*

XII

Schools may allow release time programs

A release time program is one where public school students are dismissed from their regular classes, usually for the last hour of school on a Friday afternoon, and receive instruction from someone other than school personnel. These programs can cover broad topics, including religious instruction such as "The Old or New Testament." Instructors can also conduct topical lessons on biblical themes.

In general, public schools may permit the release of students during school hours to attend religious classes taught by religious teachers on private property.[94] However, schools may not allow religious instruction to take place on school grounds during school time.[95]

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[94] *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).
[95] *Id.*

In California, pupils "may be excused from school in order to participate in religious exercises or to receive moral and religious instruction at their respective places of worship or at other suitable place or places away from school property designated by the religious group, church, or denomination." [96] A school board can adopt a resolution permitting release time for students for up to four days per month.

The following criteria have been laid out for the establishment of a "release time" program:

(1) Students must have written permission from their parents or guardians to allow them to participate;
(2) Regular attendance must be taken and reported to the school;
(3) Only one hour a week may be used for religious instruction;
(4) The school must not encourage or discourage student participation;
(5) No government funds can be used to support the program;
(6) The program must take place off school grounds;
(7) The classes cannot be taught by school personnel.[97]

In California, the following procedures are also necessary:
(a) The governing board must first adopt a resolution permitting pupils to be absent from school for such exercises or instruction.
(b) The governing board must adopt regulations governing the attendance of pupils at such exercises or instruction and reporting.
(c) Each excused pupil must attend school at least the minimum school day for his grade for elementary

[96] Educ.C. §46014.
[97] *Id.*

schools, and as provided by the rules and regulations of the State Board of Education for secondary schools.
(d) No pupil shall be excused from school for more than four days per school month. [98]

Schools can choose to allow release time classes to satisfy elective credits as long as the policy is neutrally stated and administered.[99] If the school chooses to allow students to receive credit, then they can also require that the courses satisfy specific criteria. Establishing these criteria does not unconstitutionally entangle the state with religion, even though it creates limited entanglement. At the very least a school can count the hour towards attendance for the purposes of receiving their daily attendance funding.[100] Whether or not a school grants credit to students, however, is ultimately entirely within the school board's discretion. To find out about your school district, consult the school board's policy on "release time" programs.

XIII

Instructors Can Make References to Religion While Teaching

Can the music program still perform the *Hallelujah Chorus*? Must Dante's *Inferno* be banned from the English department? Will the history department be prohibited from showing the civil rights speech, "I Have a Dream," to students because it was delivered by a Baptist minister

[98] Educ.C. §46014.
[99] *Lanner v. Wimmer*, 662 F.2d 1349.
[100] *Id.*

(Martin Luther King, Jr.) who unapologetically acknowledged his faith in God in the speech?

Many teachers find that proper coverage of certain subject matter requires reference to religion or the actual use of religious materials. Fearing professional discipline or a lawsuit, teachers frequently feel they cannot provide the best instruction for their students because they believe they must eliminate all such references.

The truth is that, when an instructor believes that incidental or illustrative reference or other use of religious materials are important for pedagogical reasons, the teacher has a right to act in the best interest of students. Under California law, references to religious art, literature, music, dance, or other topics having religious significance are legal in the classroom. As long as religious principles are not taught and the instruction is not meant to aid any religious sect, church, creed, or is for a sectarian purpose, teachers are free to make appropriate religious references.[101]

It should also be noted that many teachers have an "academic free clause" in their employment contract. As such, it is advisable that this document be reviewed carefully in that it may provide even greater rights than those found in the Education Code. The general rule is that the higher the grade level, the greater the academic freedom of the instructor.

[101] Cal. Educ.C. §51511.

XIV

Conclusion

We would like to thank you for your time and attention to this booklet. If you have any questions, or would like to request additional copies, please contact the Pacific Justice Institute. Moreover, if you would like to inquire about legal advice or assistance with one of the issues discussed in this booklet, contact the legal department of the Pacific Justice Institute for more information.

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