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HOLIDAY OBSERVANCE IN PUBLIC SCHOOLS

While students, teachers, administrators, and staff are celebrating the holidays in a variety of creative and entertaining ways in public schools across the country, we are aware that some of these celebrations may be hindered by questions of what is permitted or prohibited.

It is our concern that public schools may feel pressured to censor religious expression during the holiday season. The purpose of this paper is to assist you by answering common questions concerning what activities are permissible for schools to engage in, and to protect the rights of students to participate in Christmas or other holiday observances in public schools.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.¹

I. May schools display religious symbols during Christmas?

Several federal district courts have ruled that under certain circumstances it is permissible for a public school to display religious holiday symbols in school calendars and in holiday displays. For example, a district court in New Jersey directly addressed this issue in *Clever v. Cherry Hill Twp.* 838 F. Supp. 929, 931 (D.N.J. 1993). In *Clever*, the plaintiffs challenged a school policy that provided for religious symbols to be used in school calendars and in a Christmas display. *Id.* After noting the importance of context and the absence of denominational preference, the court upheld the policy, stating as follows:

¹ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460, 464 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously upholding the First Amendment rights of minors); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 392 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 572 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

Christmas and Chanukah are celebrated as cultural and national holidays as well as religious ones, and there is simply no constitutional doctrine which would forbid school children from sharing in that celebration, provided that these celebrations do not constitute an unconstitutional endorsement of religion and are consistent with a school's secular educational mission.

Id. at 939. The court then recognized that religion is an appropriate subject of secular study and found it “hard to imagine how such study can be undertaken without exposing students to the religious doctrines and symbols of others.” *Id.*

In *Doe v. Wilson County School System*, the district court upheld “the inclusion of a brief two minute nativity scene at the end of a twenty-two minute Christmas program” that occurred after school hours. 564 F. Supp. 2d 766, 800 (M.D. Tenn. 2008). The court cited the Supreme Court’s cases involving nativity scenes and noted that “[a] nativity scene may be displayed as one item among many secular symbols of Christmas and meet constitutional muster. . . . [but] isolating a nativity scene in such a way as to show government solidarity with the Christian faith violates the Establishment Clause.” *Id.* (citations omitted). The court explained:

[I]n the main secular portion of the Christmas program, students assumed roles with costumes and special clothing, including members of the chorus, the reader, soloist, ballerinas, toy doll, toy soldier, Santa Claus, jack-in-the-box, teddy bear, reindeer, Rudolph, and a mouse. It was much more of an extravaganza with more student participation and fanfare than the rather meager, stark nativity scene placed at the very end. The nativity scene included at the end of the Christmas program was an example of the religious heritage of the holiday and was very limited in duration as compared to the balance of the program. Unlike in the secular presentation, there were no words spoken by the students or narrated by others in the ending portion of the program. The Court concludes that the nativity scene was presented in a prudent, unbiased, and objective manner to present the traditional historical, cultural, and religious meaning of the holiday in America.

Id. The court concluded,

[c]onsidering the Christmas program as a whole, it was a secular performance with a bit of religious symbolism at the very end to reflect the historic, cultural and religious significance of the Christmas holiday. Taken as a whole, the inclusion of the nativity scene as a part of the program did not offend the Constitution.

Id. at 801; *see also County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (“[G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine.”).

II. Are students allowed to sing Christmas carols with religious themes at school events or in holiday programs?

The Establishment Clause does not prevent the singing of Christmas carols with religious origins by public school choirs. A case that addressed this specific issue upheld the singing of religious Christmas carols in public schools. In *Florey v. Sioux Falls School District*, the Eighth Circuit Court of Appeals held that the study and performance of religious songs, including

Christmas carols, are constitutional if their purpose is the “advancement of the students’ knowledge of society’s cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.” 619 F.2d 1311, 1314 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980).

The Eighth Circuit in *Florey* found that religious songs and symbols can be used in public schools if they are presented in a “prudent and objective manner and only as part of the cultural and religious heritage of the holiday.” *Id.* at 1317. It is important to note that the decision in *Florey* was based upon Supreme Court cases that permit the study of the Bible in public schools. For example, in *School District of Abington Township v. Schempp*, the Supreme Court explained:

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

374 U.S. 203, 225 (1963). Other appellate court cases have bolstered the central holding of *Florey*. The Fifth Circuit Court of Appeals, in *Doe v. Duncanville Independent School District*, upheld a school’s longtime use of “The Lord Bless You and Keep You” as its theme song. 70 F.3d 402, 404 (5th Cir. 1995). In its decision, the Court stated:

A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. . . . Such animosity towards religion is not required or condoned by the Constitution.

Id. at 408.

Similarly, in *Bauchman v. West High School*, a student sued the school due to the religious content of the songs performed by the school choir. 132 F.3d 542, 545 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998). The Tenth Circuit dismissed the lawsuit, citing *Doe* and noting that “the Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion.” *Id.* at 553. Furthermore, the court recognized that “a significant percentage of serious choral music is based on religious themes or text. Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs.” *Id.* at 554 (citations omitted). It is hardly surprising, then, that “the Constitution does not forbid all mention of religion in public schools.” *Id.*; *see also Freedom from Religion Found. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1041 (7th Cir. 2018) (upholding public school’s “Christmas Spectacular” under the Establishment Clause after the school district removed some—but not all—of its religious content).

In short, a school has discretion to decide whether to include music that contains religious themes as part of an objective classroom study or holiday performance for the purpose of advancing students’ knowledge of our cultural and religious heritage.

III. Can schools teach about the biblical origins of Christmas and Easter?

In *Stone v. Graham*, the Supreme Court stated that “the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” 449 U.S. 39, 42 (1980). Therefore, it would be constitutional for a public school teacher to have students study Biblical passages that relate to Christmas (*e.g.*, Matthew 1:18-2:22, Luke 2:1-20) if the purpose was to study the historical or literary significance of the passages. In considering the type of activities that are appropriate in public schools, the federal appeals court in *Florey* stated, “[w]e view the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.” *Florey*, 619 F.2d at 1316. The *Florey* court went on to quote the lower court with approval, stating “[t]o allow students only to study and not to perform [religious art, literature and music when] such works . . . have developed an independent secular and artistic significance would give students a truncated view of our culture.” *Id.* (alteration in original). Of course, any student who has ideological or religious objections to participating in a particular performance should be excused from the assignment.

The United States Department of Education has issued guidance for the nation’s school leaders that addresses the extent to which religious expression and teaching are allowed in public schools. The guidance states that as follows:

Public schools may not provide religious instruction, but they may teach *about* religion. For example, philosophical questions concerning religion, the history of religion, comparative religion, the Bible (or other religious teachings) as literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on philosophy, art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.²

In sum, public schools may teach about the religious origins of holidays under certain circumstances.

IV. May students discuss the religious origins of Christmas and Easter?

Students are free to discuss the Biblical origins of the Christmas and Easter holidays in school under certain circumstances. With regard to noninstructional time, the guidance of the United States Department of Education states as follows:

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles, Torahs, Korans, or other scriptures; say grace before meals; and pray or study religious materials with fellow students

² U.S. Dep’t of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, 85 Fed. Reg. 3257, 3269-70 (Jan. 16, 2020) (hereafter referred to as *Guidance*).

during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities. While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious perspectives in applying such rules and restrictions.³

Also, although schools may impose reasonable time, place, and manner restrictions on the distribution of literature containing religious messages, they may not place a regulation that targets only religious literature. In 2011, the Fifth Circuit Court of Appeals held, in an *en banc* review, that the First Amendment prohibits viewpoint discrimination against elementary students' religious expression, such as the distribution of religious-themed gifts or literature to other students at school parties or during non-instructional time when secular items may be distributed. *Morgan v. Swanson*, 659 F.3d 359, 401–12 (5th Cir. 2011) (*en banc*). The court first noted that “First Amendment rights are of paramount importance in school facilities.” *Id.* at 403. Considering the particular facts at issue, the court disagreed with the defendants' claims, finding that, among other similar incidents, student distribution of candy canes with a religious message attached (during a school party in which other students could distribute personal gifts), could not be considered school-sponsored speech that implicates the Establishment Clause. *Id.* at 407–10.

In short, students may discuss religious matters in public school under certain circumstances.

V. Are students permitted to write about the origin of Christmas and the birth of Jesus or other religious sentiments in school assignments?

A student's private religious speech is protected by the First Amendment, so long as that speech does not “materially or substantially interfere with school discipline.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504 (1969). It is well established that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. The Supreme Court's cases

establish[] that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted). In *Board of Education v. Mergens*, the Court noted: “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” 496 U.S. 226, 250 (1990).

³ *Guidance*, 85 Fed. Reg. at 3266.

Additionally, the U.S. Department of Education’s guidance on religious expression in public schools clearly states that students are permitted to discuss religious topics 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 (such as literary quality) and neither penalized nor rewarded on account of its religious content.⁴

Thus, for example, if a student were instructed to write an essay discussing what his favorite holiday is and why, he should be able to write an essay explaining that his favorite holiday is Christmas because it represents the birth of Jesus. The essay should be judged by normal academic standards, such as literary quality and grammar, without regard to the essay’s religious viewpoint.

VI. May schools continue to refer to the “Christmas” and “Easter” holidays?

School districts are under no constitutional obligation to rename the Christmas and Easter holidays. The Supreme Court itself has acknowledged with approval that Congress gives federal employees a paid holiday on December 25 and calls that holiday “Christmas.” *See Lynch v. Donnelly*, 465 U.S. 668, 675, 680 (1984); 5 U.S.C. § 6103(a).

Federal and state laws that designate Christmas and Easter as official holidays are constitutionally sound.⁵ For instance, in *Bridenbaugh v. O’Bannon*, the Seventh Circuit held that Indiana’s recognition of Good Friday as a legal holiday did not violate the Establishment Clause. 185 F.3d 796 (7th Cir. 1999). In reaching this result, the court noted that:

the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day. No court has ever held that the Establishment Clause is violated merely because a state holiday has the indirect effect of making it easier for people to practice their faith.

Id. at 801–02.

Conclusion

We hope that this paper helps clarify some of the issues surrounding the role of religious expression in the public schools during the holiday season. The American Center for Law and

⁴ *Guidance*, 85 Fed. Reg. at 3268.

⁵ *See generally Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (upholding a Maryland law recognizing Good Friday as a public school holiday); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (upholding a practice of some Kentucky state court offices to close on Good Friday).

Justice is committed to defending the constitutional rights of students on their public school campuses and to assisting public schools in complying with the First Amendment. Please feel free to share this information with your school's board, attorney, principal, staff, and students.

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Last updated: October 27, 2022