



MEMORANDUM

These issue summaries provide an overview of the law as of the date they were written and are for educational purposes only. These summaries may become outdated and may not represent the current state of the law. Reading this material DOES NOT create an attorney-client relationship between you and the American Center for Law and Justice, and this material should NOT be taken as legal advice. You should not take any action based on the educational materials provided on this website, but should consult with an attorney if you have a legal question.

Teacher/Administrator Rights & Responsibilities

As the Supreme Court has held, teachers, like students, do not lose their constitutional rights to freedom of speech and expression on public school campuses. However, public school teachers play a uniquely important role in influencing students, and as such they must use special care to not inhibit the free speech rights of students

Generally speaking, teachers represent the school in the classroom or at school-sponsored events and need to govern their behavior to avoid any Establishment Clause violations. *See, e.g., Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (holding that “[w]hile at the . . . school, whether he is in the classroom or outside of it during contract time, [a teacher] is not just any ordinary citizen”); *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir. 1999) (holding that “the scope of the employees’ rights must sometimes yield to the legitimate interest of the governmental employer in avoiding litigation by those contending that an employee’s desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation”). The Establishment Clause prohibits a public school from endorsing a religion or coercing students to participate in religious activity. *Lee v. Weisman*, 505 U.S. 577 (1992). Teachers, however, do have First Amendment rights that they may wish to exercise in their role as educators. As a general principle, teachers retain their First Amendment rights in public schools. The Supreme Court has held that “teachers [do not] shed their constitutional rights to freedom of speech or expression at the school house gate.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Moreover, the Establishment Clause does not prohibit all religious instruction in public schools. “[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). In fact, the Supreme Court has recognized that “it might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.” *Abington*, 374 U.S. at 225.

Thus, teachers can teach about and/or distribute material with religious content for educational purposes. In addition, teachers may discuss religious matters with their students on an individual basis if the student initiates the topic, the student is not compelled or forced to discuss the topic, and the student is not compelled to accept the teacher’s views. *Roman v. Appleby*, 558 F. Supp. 449 (E.D. Penn. 1983).

U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003) addresses the position that teachers and administrators should take:

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. *Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities.* Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities.

Id. at 9647 (emphasis added). Thus, public school teachers, when they are not in their official capacities, may discuss religious matters in communication with their students.

Concerning the issue of school censorship of books and placement of items on teachers’ desks, a federal court has stated that the presence of religious books in elementary school classrooms do not by themselves violate the Constitution, but if they are placed in classrooms by teachers for a religious purpose, a violation of the Establishment Clause may have occurred. *Roberts v. Madigan*, 921 F.2d 1047, 1054–58 (10th Cir. 1990). The court held that the free speech and free exercise rights of a fifth-grade school teacher were not violated when the school district ordered him to remove his Bible from his classroom desk during class. *Id.* The

court considered the facts “in light of the environment of a fifth-grade classroom,” and found that there was sufficient evidence that the teacher’s actions had a religious purpose. *Id.* at 1057 (characterizing elementary school students as “impressionable”). Although the facts were clear that the teacher never read the Bible aloud to the students nor overtly proselytized, the placement of the Bible on the desk and the teacher’s reading it quietly at his desk during the class time silent reading period was considered “a crucial symbolic link between government and religion.” *Id.* at 1058 (internal citations omitted) (The dissent characterized the majority’s analysis as a “bald conclusion” with “no evidence to support such.” *Id.* at 1061 (Barrett, J., dissenting)). In the *Roberts* case, however, the Tenth Circuit did uphold the district court’s injunction that the school district must replace the Bible it had removed from the elementary school library and “not remove it in the future.” *Id.* at 1053 n.6. It is necessary for both teachers and administrators to note that the court recognized that within certain bounds school officials shall be allowed to exercise discretion in deciding what materials or classroom practices are properly being used. *Id.* at 1055.

In addition to religious activities of teachers and administrators, the debate of how to handle the issue of creation science in our public schools is getting a lot of attention across the country. As a general principle, school officials are given broad authority to adopt and implement public school curricula, and to ensure that teachers teach the curriculum for which they were hired. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Despite this general deference to school officials’ judgment, courts, including the Supreme Court of the United States, have held that a requirement that creation or creation science be taught in the public school classroom violates the Establishment Clause. The Supreme Court has thus far struck down state statutes that forbade teaching evolution, *Epperson v. Arkansas*, 393 U.S. 97 (1968), or that required that creation science be taught alongside evolution, *Edwards v. Aguillard*, 482 U.S. 578 (1987). Other courts have struck down statutes that required a balanced treatment of creation science and evolution, *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982), or that required oral or written disclaimers be made before evolution could be taught. *See, e.g., Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999) (oral disclaimer); *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005) (sticker disclaimer on textbooks), *vacated*, 449 F.3d 1320 (11th Cir. 2006); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005) (disclaimer that listed Intelligent Design as an alternative to evolution). The Ninth Circuit Court of Appeals has also ruled against a challenge that evolution constitutes a religious belief system. *Peloza*, 37 F.3d at 519.

The common constitutional flaw courts have found in the various statutes has been the lack of a secular purpose. For example, in *Edwards*, the Court noted that “the preeminent purpose of the [Creationism Act] was clearly to advance the religious viewpoint that a supernatural being created human kind.” *Edwards*, 482 U.S. at 591. In determining if the purpose was secular or religious, the courts will often look to the legislative hearings. In *Edwards*, the legislative history showed the Act’s purpose was to change the science curriculum to give an “advantage to a particular religious doctrine,” and the bill’s sponsor was opposed to evolution because it was “contrary to his own religious beliefs.” *Id.* at 592. Thus, because the statute’s primary purpose was to endorse a particular religious doctrine, the Establishment Clause had been violated. *See also McLean*, 529 F. Supp. at 1264 (holding statute unconstitutional when Act “was simply and purely an effort to introduce the Biblical version of creation into the public school curricula”). In *Kitzmiller*, the court in essence held that even a bare reference to Intelligent Design violates the Establishment Clause if that reference is understood to endorse or have the primary purpose or effect of advancing religion. 400 F. Supp. 2d at 727 n.7. According to the court, the board’s supposed secular purposes were “a pretext” for its purpose of promoting religion. *Id.* at 763. Further, the Seventh Circuit Court of Appeals has held that a teacher may not teach creation science because it would be “injecting religious advocacy into the classroom.” *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990).

While a reference to creation science cannot be required in public schools, creation science need not be shut out and removed entirely from the discussion of the origins of life in public schools. The Supreme Court has opined that “teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.” *Edwards*, 482 U.S. at 594. The Fifth Circuit Court of Appeals, although striking down a disclaimer, “acknowledge[d] that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms.” *Freiler*, 185 F.3d at 345–46. The court explained that “the dual objectives of disclaiming orthodoxy of belief [in evolution] and reducing student/parent offense are permissible secular objectives that the School Board could rightly address.” *Id.* at 345.

Thus, teachers have “the right to discuss alternate theories of the creation of life and could independently research such topics.” *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 828 (E.D. La. 1997), *aff’d*, 185 F.3d 337 (5th Cir. 1999). However, teachers have a responsibility to teach the curriculum in the manner designated by their superiors. *LeVake v.*

Indep. Sch. Dist. No. 656, 625 N.W.2d 502, 508-09 (Minn. Ct. App. 2001). Furthermore, teachers may not refuse to teach a subject with which he or she disagrees when that subject is specifically prescribed by the curriculum the teacher has been hired to teach. *Pelosa*, 37 F.3d at 521-22.