Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

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U.S. Department of Education and U.S. Department of Justice

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I. Introduction

Section 8524(a) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act and codified at 20 U.S.C. § 7904(a), requires the Secretary to issue guidance to State educational agencies (SEAs), local educational agencies (LEAs), and the public on constitutionally protected prayer in public elementary and secondary schools. In addition, section 8524(b) requires that, as a condition of receiving ESEA funds, an LEA must certify in writing to its SEA that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as detailed in this updated guidance.

The purpose of this updated guidance is to provide information on the current state of the law concerning religious expression in public schools. Part I is an introduction. Part II clarifies the extent to which prayer in public schools is legally protected. LEAs and SEAs are responsible, under section 8524(b) of the ESEA, to certify their compliance with the standards set forth in Part II.

Part III of this updated guidance generally addresses principles of religious liberty that relate to religious expression more broadly, including prayer, in accordance with Executive Order 13798 (May 4, 2017), 82 Fed. Reg. 21675 (May 9, 2017), and the Attorney General's Memorandum on Federal Law Protections for Religious Liberty of October 7, 2017, 82 Fed. Reg. 49668 (Oct. 26, 2017) (AG Memo). It is meant to advise SEAs and LEAs on how to comply with governing constitutional and statutory law, but it is not a part of the required certification under section 8524(b) of the ESEA. Part IV discusses the Equal Access Act, which provides statutory protection for religious expression in public schools. These broader principles were drawn substantially from a 1995 presidential memorandum, *Memorandum on Religious Expression in Public Schools*, 2 Pub. Papers 1083 (July 12, 1995), and a 1998 Department of Education memorandum, Richard W. Riley, U.S. Secretary of Education, *Religious Expression in Public Schools: A Statement of Principles* (June 1998).

The Office of Legal Counsel in the Department of Justice and the Office of General Counsel in the Department of Education have jointly approved this updated guidance as reflecting the current state of the law. This updated guidance will be made available on the Department of Education's website (www.ed.gov) and the Department of Justice's website (www.justice.gov).

A. The Section 8524 Certification Process

To receive funds under the ESEA, an LEA must certify in writing to its SEA that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as detailed in Part II of this updated guidance. An LEA must provide this certification to the SEA by October 1 of each year during which the LEA participates in an ESEA program.

Each SEA should establish a process by which its LEAs may provide the necessary certification. There is no specific Federal form that an LEA must use in providing this certification to its SEA. The certification may be provided as part of the application process for ESEA programs, or separately, and in whatever form the SEA finds most appropriate, as long as the certification is in writing and clearly states that the LEA has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as detailed in this updated guidance.

Section 8524(b) of the ESEA also requires that, by November 1 of each year, each SEA must send to the Secretary a list of those LEAs that have not filed the required certification or that have been the subject of a complaint to the SEA alleging that the LEA has a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools. The SEA must provide a process for filing a complaint against an LEA that allegedly denies a person, including a student or employee, the right to participate in constitutionally protected prayer. To the extent the SEA has notice of a public legal charge or complaint such as a lawsuit filed against an LEA, alleging that the LEA denied a person the right to participate in constitutionally protected prayer, the SEA must report the complaint to the Secretary. The SEA must report all complaints that are filed through the process the SEA provides, including complaints that the SEA may deem meritless, to the Secretary. This list should be sent to:

Office of Elementary and Secondary Education and
Center for Faith and Opportunity Initiatives
Attention: Phyllis Knight and Angel Rush
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The SEA's submission should describe what investigation and/or enforcement action the SEA has initiated with respect to each listed LEA and the status of the investigation or action. The SEA should not send the LEA certifications to the Secretary but should maintain these records in accordance with its usual records retention policy.

B. Enforcement of Section 8524

Under section 8524(c) of the ESEA, the Secretary is authorized and directed to effectuate compliance with this section by issuing, and securing compliance with, rules or orders with respect to an LEA that fails to certify, or is found to have certified in bad faith, that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools. The General Education Provisions Act also authorizes the Secretary to bring enforcement actions against recipients of Federal education funds that are not in compliance with the law. 20 U.S.C. §§ 1234c–1234e. Such measures include withholding funds until the recipient comes into compliance.

If an LEA fails to file the required certification, or is found to have a policy that prevents or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, the SEA should ensure compliance in accordance with its regular enforcement procedures.

C. Overview of Governing Constitutional Principles

The relationship between religion and government in the United States is governed by the First Amendment to the Constitution, which the Supreme Court has held both prevents the government from establishing religion and protects privately initiated religious expression and activities from government interference and discrimination.[1] The legal rules that govern the issue of constitutionally protected prayer in the public schools are similar to those that govern religious expression generally. The Supreme Court has repeatedly held that the First Amendment requires public school officials to show neither favoritism toward nor hostility against religious expression such as prayer.[2] The line between government-sponsored and privately-initiated religious expression is vital to a proper understanding of the First Amendment's scope. As the Court has explained in several cases, "there 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."[3]

The Supreme Court's decisions set forth principles that distinguish impermissible governmental religious speech from constitutionally protected private religious speech. For example, teachers and other public school officials, acting in their official capacities, may not lead their classes in prayer, devotional readings from the Bible, or other religious activities,[4] nor may school officials use their authority to attempt to persuade or compel students to participate in prayer or other religious activities.[5] The Supreme Court has held, for example, that public school officials violated the Establishment Clause by inviting a rabbi to deliver a prayer at a graduation ceremony because such conduct was "attributable to the State" and applied "subtle coercive pressures," "where the student had no real alternative which would have allowed her to avoid the

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[1] The relevant portions of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The Supreme Court has held that the Fourteenth Amendment makes these provisions applicable to all levels of government—Federal, State, and local—and to all types of governmental policies and activities. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

[2] *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

[3] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *accord Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995).

[4] *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating state laws directing the use of prayer in public schools); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer). The Supreme Court has also held, however, that the study of the Bible or of religion, when presented objectively as part of a secular program of education (e.g., in history or literature classes), is consistent with the First Amendment. *See Schempp*, 374 U.S. at 225.

[5] *See Lee v. Weisman*, 505 U.S. 577, 599 (1992); *see also Wallace v. Jaffree*, 472 U.S. 38 (1985).

fact or appearance of participation."[6] Accordingly, school officials may not select public speakers on a basis that favors religious speech.[7]

Although the Constitution forbids public school officials from directing or favoring prayer in their official capacities, students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[8] The Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[9] Moreover, not all religious speech that takes place in the public schools or at school-sponsored events is governmental speech.[10] For example, "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday,"[11] and students may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics.

Local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities,[12] but they may not structure or administer such rules to discriminate against speech with a religious perspective. Where schools permit student expression on the basis of genuinely content-neutral criteria, and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the State and may not be restricted because of its religious content.[13] Public schools also may not restrict or censor prayers on the ground that they might be deemed "too religious" to others. The Establishment Clause prohibits State officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they "nonsectarian" and "nonproselytizing"

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[6] *Lee*, 505 U.S. at 587–88.
[7] *Santa Fe*, 530 U.S. 290 (2000).
[8] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
[9] *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226; *Widmar v. Vincent,* 454 U.S. 263 (1981); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981)).
[10] *Santa Fe*, 530 U.S. at 302 (explaining that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events" is "the government's own").
[11] *Id.* at 313.
[12] For example, the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–86 (1986). Without more, however, such review does not make student speech attributable to the State.
[13] *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, . . . the State must respect the lawful boundaries it has set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech because of its viewpoint." (citations and quotations omitted); *see also Lamb's Chapel*, 508 U.S. at 392 ("[C]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." (quotations omitted)); *Widmar*, 454 U.S. at 269–76; *Good News Club*, 533 U.S. at 122 (Scalia, J., concurring) ("Even subject-matter limits must be reasonable in light of the purpose served by the forum" (citations and quotations marked omitted)); .

or the opposite.[14] Student remarks are not attributable to the school simply because they are delivered in a public setting or to a public audience.[15] As the Supreme Court has explained, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated,"[16] and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.[17]

II. Applying the Governing Constitutional Principles in Particular Contexts Related to Prayer

A. Prayer During Non-instructional Time

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 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.

B. Organized Prayer Groups and Activities

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other noncurricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination because of the religious perspective of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding noncurricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to engage in religious expression such as prayer. School authorities may disclaim sponsorship of noncurricular groups and events, provided they administer such disclaimers in a

[14] *See Engel v. Vitale*, 370 U.S. 421, 429–30 (1962) (explaining that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," that "neither the power nor the prestige" of State officials may "be used to control, support or influence the kinds of prayer the American people can say," and that the State is "without power to prescribe by law any particular form of prayer").
[15] *Santa Fe*, 530 U.S. at 302; *Rosenberger*, 515 U.S. at 834–35.
[16] *Mergens*, 496 U.S. at 250 (plurality op.).
[17] *Rosenberger*, 515 U.S. at 845–46; *Everson*, 330 U.S. at 18.

manner that neither favors nor disfavors groups that meet to engage in prayer or express religious perspectives.

C. Teachers, Administrators, and Other School Employees

When acting in their official capacities as representatives of the State, teachers, school administrators, and other school employees are prohibited by the First Amendment from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers, however, may take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Teachers also may take part in religious activities such as prayer even during their workday at a time when it is permissible to engage in other private conduct such as making a personal telephone call. 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. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies or similar events.

D. Moments of Silence

If a school has a "moment of silence" or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may neither require, encourage, nor discourage students from praying during such time periods.

E. Accommodation of Prayer During Instructional Time

Schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a significant burden on their religious exercise, including prayer, where doing so would not impose material burdens on other students. For example, it would be lawful for schools to excuse Muslim students from class to enable them to fulfill their religious obligations to pray during Ramadan.

F. Prayer 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 perspective 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 perspective.

G. Student Assemblies and Noncurricular Events

Student speakers at student assemblies and noncurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious perspectives. Where student speakers are selected on the basis of genuinely content-neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content, and may include prayer. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.

H. Prayer at Graduation

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely content-neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content and may include prayer. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.

I. Baccalaureate Ceremonies

School officials may not mandate or organize religious ceremonies. However, 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, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

III. Applying the Governing Constitutional Principles in Particular Contexts Related to Religious Expression

A. Religious Literature

Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on non-school literature generally, but they may not single out religious literature for special regulation.

B. Teaching about Religion

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.

C. Student Dress Codes and Policies

Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Schools, however, may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. If a school makes exceptions to the dress code for nonreligious reasons, it must also make exceptions for religious reasons, absent a compelling interest. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

D. Religious Excusals

Where school officials have a practice of excusing students from class on the basis of parents' requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment. In addition, in some circumstances, based on Federal or State constitutional law or pursuant to State statutes, schools may be required to make accommodations that relieve substantial burdens on students' religious exercise. School officials are therefore encouraged to consult with their attorneys regarding such obligations.

IV. The Equal Access Act

The Equal Access Act, 20 U.S.C. § 4071, is designed to ensure that student religious activities are accorded the same access to Federally funded public secondary school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has developed the following guidance for interpreting the Act's requirements:

General Provisions: Student religious groups at Federally funded public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a public secondary school receiving Federal funds that creates a "limited open forum" may not refuse student religious groups access to that forum. A "limited open forum" exists "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b).

Prayer Services and Worship Exercises: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Means of Publicizing Meetings: A public secondary school receiving Federal funds must allow student groups meeting under the Act to use the school media—including the public address system, the school newspaper, and the school bulletin board—to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school-sponsored.

Lunch-time and Recess: The Equal Access Act prohibits a Federally funded public secondary school from denying a religious student group equal access to a limited open forum. A "limited open forum" exists "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.* Accordingly, a Federally funded secondary school triggers equal access rights for religious groups when it allows students to meet during their lunch periods or other non-instructional time during the school day, as well as when it allows students to meet before and after the school day.

Leadership of Religious Student Groups: Similar to other student groups such as political student groups, the Equal Access Act permits religious student groups to allow only members of their religion to serve in leadership positions if these leadership positions are positions that affect the religious content of the speech at the group's meetings. For example, a religious student group may require leaders such as the group's president, vice-president, and music coordinator to be a dedicated member of a particular religion if the leaders' duties consist of leading prayers, devotions, and safeguarding the spiritual content of the meetings.