

# RELIGION IN THE PUBLIC SCHOOLS

## DISTRIBUTION OF RELIGIOUS MATERIALS BY STUDENTS

The First Amendment's free speech clause provides students with a right to free expression in public schools, including a limited right to distribute religious and non-religious materials within public schools.<sup>1</sup> The specific limitations depend on whether the materials are distributed within or outside school-sponsored activities. Additionally, the age of the students affects these rights: high-school students have greater freedom of expression compared to elementary school students.<sup>2</sup>

Outside of school-sponsored activities, a school can prohibit distribution of materials that materially or substantially disrupts the school or invades the rights of others.<sup>3</sup> Within school-sponsored activities, a school can restrict distribution provided the limitation is reasonably related to a legitimate educational concern.<sup>4</sup>

Furthermore, in order to avoid violating the Establishment Clause, it is essential that the school neither sponsor nor appear to sponsor the distribution of religious materials by students.<sup>5</sup>

### SPECIFIC ISSUES & QUESTIONS

**What concerns arise when students distribute religious material prepared by a student or outside organizations?** The distribution by students of religious material, under a school's auspices and with its apparent sanction, creates the serious danger of school and state advancement of specific religious practices or beliefs, or at a minimum the impression of such endorsement, which may violate the Establishment Clause.

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<sup>1</sup> *Tinker v. DeMoines Indep. Community School District*, 393 U.S. 503 (1969).

<sup>2</sup> *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011); *Walker-Serrano v. Leonard*, 325 F.3d 412 (3rd Cir. 2003); *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3rd Cir. 2003), cert denied, 541 U.S. 936 (2004); see also *K.A. ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99 (3d Cir. 2013).

<sup>3</sup> *Tinker*, 393 U.S. 503.

<sup>4</sup> *Hazelwood School District, et. al. v. Kuhlmeier*, 484 U.S. 260 (1987).

<sup>5</sup> See *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001); *Morgan*, 659 F.3d 359.

Students of minority religions, or those who do not practice a religion, may face considerable pressure from students distributing the religious material to accept it, and may be harassed, intimidated, or ostracized if they decline. Such distribution may interfere with the rights and well-being of other students, as well as disrupt the educational process and the fundamental mission of the school to create a learning environment that is hospitable to all students.

### **How may a school limit a student's distribution of religious materials prepared by the student or outside organizations?**

#### On-Campus Distribution Outside of Curricular or School-Sponsored Activities:

School officials can prohibit student speech, including distribution of materials prepared by the student or outside groups, where they can reasonably forecast that such speech will materially or substantially disrupt the school or school activities, or invade the rights of other students.<sup>6</sup> However, a prohibition on student distribution of materials simply to avoid the discomfort or unpleasantness of an unpopular view is not permissible.<sup>7</sup>

This standard, however, is not uniformly applied to elementary through high-school students. The rights of elementary school students are more limited because they are more susceptible to coercion and peer pressure, whereas older students are more emotionally and intellectually capable of coping with potentially offensive speech.<sup>8</sup> One U.S. Court of Appeals has found that “when officials have a legitimate educational reason – whether grounded on the need to preserve order, to facilitate learning, or social development, or to protect the interests of other students – they may ordinarily regulate public elementary school children’s speech.”<sup>9</sup>

Schools may also adopt certain policies regulating student distribution of materials. However, regarding distributions outside of curricular or school-sponsored activities, the policies should be neutral to the viewpoints expressed in the materials.<sup>10</sup>

A school may require a review of materials before they are distributed and can prohibit distribution if the materials are, for example, threatening, obscene, lewd, promote drug use, or would materially or substantially disrupt the school.<sup>11</sup> School officials can require that materials carry a disclaimer reflecting the school’s neutrality on their content or views expressed.<sup>12</sup> Indeed, a disclaimer requirement can be an effective tool to ensure that a school fulfills its constitutional duty not to endorse or sponsor a student’s religious speech.

<sup>6</sup> *Tinker*, 393 U.S. 503.

<sup>7</sup> *Id.*

<sup>8</sup> *Morgan*, 659 F.3d 359; *Walker-Serrano*, 325 F.3d 412.

<sup>9</sup> *Walker-Serrano*, 325 F.3d 412.

<sup>10</sup> *M.A.L. v. Stephen Kinsland*, 543 F.3d 841 (6th Cir. 2008), rehearing en banc denied, 2009 U.S. App. LEXIS 24176.

<sup>11</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503; *M.A.L.*, 543 F.3d 841; *Pounds v. Katy Indep. School Dist.*, 517 F. Supp. 2d 901 (S.D. Tex 2007).

<sup>12</sup> See *Muller v. Jefferson Light-House School*, 98 F.3d 1530 (7th Cir. 1996).

A school also may place reasonable time, place and manner restrictions on student distribution of materials.<sup>13</sup> However, at least one court has held that an across-the-board ban of student-to-student distribution of materials on school grounds is not permissible.<sup>14</sup>

### Distribution within Curricular or School-Sponsored Activities

In addition to the rules concerning on-campus distribution of materials outside of curricular or school-sponsored activities, school officials have further authority to prohibit or restrict student speech, including student distribution of materials, within curricular or school-sponsored activities. The general rule is that a school may prohibit a distribution as long as the action is reasonably related to a pedagogical or educational concern.<sup>15</sup> High-school students have greater freedom of expression rights in school-sponsored activities than elementary school students.<sup>16</sup>

School-sponsored activities are not limited to the traditional classroom setting.<sup>17</sup> Rather, they can be any school activity that is supervised by faculty members and designed to impart knowledge or skills to students, or bear the imprimatur of the school.<sup>18</sup> A recent U.S. Court of Appeals decision outlined a number of factors to determine whether speech occurs at a school-sponsored activity, including:

- Where and when does the speech occur;
- Are students at the activity a captive audience;
- Is the activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials, and
- Is the activity designed to impart some skills or knowledge to students.<sup>19</sup>

Within school-sponsored activities, school officials may prohibit student distribution of materials based on their viewpoint or content.<sup>20</sup> For instance, U.S. Courts of Appeals have allowed schools to prohibit student distribution of materials based on their religious content.<sup>21</sup> In one decision, the Court found that the school had a legitimate educational purpose in avoiding elementary school

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<sup>13</sup> See *M.A.L.*, 543 F.3d 841; *Pounds*, 517 F. Supp. 2d 901; *Leal v. Everett Public Schools*, 2015 U.S. LEXIS Dist. 153319 (W.D. WA. Feb., 19 2015).

<sup>14</sup> *J.S. v. Holly Area Schools*, 749 F. Supp. 2d 614 (E.D. Mich. 2010); see also *K.A. ex rel. Ayers*, 710 F.3d 99.

<sup>15</sup> *Hazelwood*, 484 U.S. 260.

<sup>16</sup> See *Walz*, 342 F.3d 271.

<sup>17</sup> *Hazelwood*, 484 U.S. 260.

<sup>18</sup> See *Hazelwood*, 484 U.S. 260; *Morgan*, 659 F.3d 359.

<sup>19</sup> *Morgan*, 659 F.3d 359.

<sup>20</sup> See *Morgan*, 659 F.3d 359; *Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008), rehearing en banc denied, 2008 LEXIS 12169, *cert denied*, 555 U.S. 1069; *Walz*, 342 F.3d 271.

<sup>21</sup> See *Curry*, 513 F.3d 570; *Walz*, 342 F.3d 271.

children being subjected to an unsolicited religious promotional message that might conflict with what they are taught at home.<sup>22</sup>

## SAMPLE SCENARIOS & SITUATIONS

### **Fifth-grader Distributes Religious Pamphlet to Peers at Lunchtime**

Charles Hamilton, a fifth grade student at Benjamin Franklin Elementary School, brought 35 copies of a pamphlet entitled "Good Fun" to school. The pamphlet, prepared by an evangelical organization, contained crossword puzzles, word searches and comic strips. The theme running through "Good Fun" was the power of religion and the evils of secularism. Charles gave out his copies of "Good Fun" during lunch to the students who were waiting in the cafeteria line. Jonathan Freeman, a fourth grade student, accepted the pamphlet and played through the puzzles that evening. When Jonathan's mother realized that the pamphlet was religious material of a proselytizing nature, she called the principal of Benjamin Franklin Elementary School seeking an explanation. The principal had no knowledge that Charles had distributed "Good Fun" and agreed with Mrs. Freeman that the matter had to be looked into and resolved.

**How should the principal resolve this matter?**

**Does Charles have the right to distribute "Good Fun" in school?**

*The school is required to allow Charles to distribute "Good Fun" subject to certain time, place, and manner restrictions designed to prevent disruption to the educational process and to prevent disruption of the rights and well-being of fellow students. Such content-neutral regulations typically provide that materials may only be distributed during certain times of the day, and from designated locales.*

### **Second-grader Asks to Distribute Candy with an Attached Religious Message at a Curricular Holiday Program**

As part of the elementary school curriculum, second-graders at Draper Elementary School participate in a two-day exercise called Draper Market where students create and produce a good which they sell for fake money in a market setting. Cindy Jones wants to sell candy cane ornaments with an attached card containing a religious message. Cindy's teacher Mrs. Lutz will allow Cindy to sell the ornaments, but without the attached card. Cindy tells her parents who complain to the school principal that Cindy's freedom of speech is being violated.

**Does Cindy have the right to distribute the ornament with the card containing the religious message?**

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<sup>22</sup> Curry, 513 F.3d 570.

Most likely not – Draper Market is part of the school curriculum. Therefore, the school can restrict distribution of student materials based on the material’s content or viewpoint where there is a valid educational purpose. Under similar circumstances, a U.S. Court of Appeals found that a religious message could offend other students and their parents, and therefore the school’s desire to avoid having a curricular event offend students or parents, and to avoid subjecting young children to an unsolicited religious message contrary to what they might learn at home is a valid educational purpose to prohibit distribution of a religious message.

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