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*foundation*



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FREETHOUGHT  
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M E M O R A N D U M

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TO: Florida Public Schools  
FROM: Annie Laurie Gaylor, Co-President, Freedom From Religion Foundation  
Dan Barker, Co-President, Freedom From Religion Foundation  
David Williamson, Founder, Central Florida Freethought Community  
DATE: August 13, 2015  
RE: Protecting Florida public schools from common First Amendment violations

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Each year, the Freedom From Religion Foundation addresses more than 1,000 state-church violations around the nation, more than half of which involve public schools. Our attorneys have written to Florida school districts about more than 65 such violations in the past two school years. We were even forced to sue a Florida school district over bible distributions.

This memorandum presents the law controlling the most common state-church complaints we receive from Florida families. We hope this will help educate district staff on how to protect students' rights of conscience by enforcing the Florida Constitution and Establishment Clause of the First Amendment.

FFRF is a national nonprofit organization with more than 22,500 members across the country, including 1,100 members in Florida. The Central Florida Freethought Community is a chapter of FFRF. We protect the constitutional separation between state and church.

**General principle: Students have a right to a public education free from religion**

The separation between state and church is one of the most fundamental principles of our system of government. It is well settled that, as government bodies charged with educating the children of every citizen, public schools may not advance or endorse religion.<sup>1</sup> Further, the Florida public schools are barred from “aiding, abetting, commanding, counseling, inducing, ordering, or procuring school organized or officially sanctioned religious activity.”<sup>2</sup>

The U.S. Supreme Court has explained that when a school sponsors religion or a religious message “it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community and accompanying message to adherents that they are insiders, favored members of the political community.’”<sup>3</sup> That message alienates a rapidly growing population. Overall, 23% of U.S. adults identify as nonreligious.<sup>4</sup> That 8 point increase since 2007<sup>5</sup> and 15 point jump since 1990 makes the “nones”

the fastest growing identification in America.<sup>6</sup> In Florida, the numbers are slightly higher: 24% of Floridians are nonreligious, up from 16% in 2007.<sup>7</sup> Nationally, about 35% of millennials—Americans born after 1981, i.e., all Florida’s public school students—are nonreligious.<sup>8</sup>

The following list summarizes the state of the law on the most common public school Establishment Clause infractions. Detailed explanations with citations to case law follow:

1. School events, including graduations and athletic events, may not include prayer.
2. School staff, including teachers and coaches, may not organize, endorse, promote, or participate in prayers with students. Nor may staff or non-school personnel participate in religious activities of student clubs such as the Fellowship of Christian Athletes.
3. School events, including graduations, should not be held in churches.
4. Schools may not organize, endorse, promote, or participate in baccalaureate services.
5. School clubs and athletic teams may not have a “chaplain” or religious counselor.
6. Schools may not teach religious doctrine, including creationism or intelligent design.
7. Schools must charge a fair rent to all organizations that lease school property; churches leasing school property must actually pay that rent and can only use school property during noninstructional time rental hours.
8. Schools may not allow the distribution of bibles or religious literature on school property.
9. Schools may not force students to stand for or recite the Pledge of Allegiance.
10. Schools may not disallow atheist or non-believer clubs if other non-curricular clubs are allowed, regardless of whether a staff advisor volunteers.
11. Schools may not allow religious displays on school property, including in classrooms and teachers’ displays.
12. “Voluntariness” cannot excuse a constitutional violation.

## **1. School events, including graduations and athletic events, may not include prayer.**

The U.S. Supreme Court has continually struck down prayers at school-sponsored events, including public school graduations and athletic events.<sup>9</sup> School officials may not invite a student, teacher, faculty member, or clergy to give any type of prayer, invocation, or benediction at any public school events. Even student-led prayer at a student event is impermissible.<sup>10</sup> Nor may students be asked or ask to vote on whether to hold prayer at school events. “[A] student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. ‘[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections...’”<sup>11</sup>

**2. School staff, including teachers and coaches, may not organize, endorse, promote, or participate in prayers with students. Nor may staff or non-school personnel participate in religious activities of student clubs such as the Fellowship of Christian Athletes.**

Of course, students remain free to pray on their own. But public school teachers may not lead their students in prayer, encourage students to pray, schedule or participate in student-initiated prayer, or otherwise endorse religion to students. The Supreme Court has continually struck down teacher or school-led prayer in public schools.<sup>12</sup>

Federal courts have held that even a public school coach's silent participation in student prayer circles is unconstitutional.<sup>13</sup>

Districts cannot prohibit students from organizing a religious club (providing noncurricular clubs are permitted) or participating in a private prayer event (that is nondisruptive and follows content-neutral school rules). But the Supreme Court has stated that public school staff members cannot participate in students' religious activities while acting in their governmental roles.<sup>14</sup>

Staff advisors for noncurricular clubs, which any religious club is by definition, cannot be anything other than chaperones: "Under the [Equal Access] Act . . . faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control or regularly attend activities of student groups."<sup>15</sup> FCA staff advisors cannot organize, participate, or lead student-club meetings. Nor may non-school persons regularly participate in meetings.<sup>16</sup>

**3. School events, including graduations, should not be held in churches.**

Public school programming, including graduations, testing, choir recitals, award ceremonies, and plays, should not occur in churches.<sup>17</sup> Doing so "sends the message that [the school] is closely linked with [the church] and its religious mission, that it favors the religious over the irreligious, and that it prefers Christians over those that subscribe to other faiths, or no faith at all."<sup>18</sup>

Budget considerations or other motives cannot trump students' rights. Any court would "reasonably conclude that the District would only choose such a proselytizing environment aimed at spreading religious faith . . . if the District approved of the Church's message."<sup>19</sup>

**4. Schools may not organize, endorse, promote, or participate in baccalaureate services.**

Baccalaureate programs are religious services that include prayer and worship. Schools and school staff may not in any way plan, design, or supervise baccalaureate programs.<sup>20</sup>

When courts have permitted privately-sponsored baccalaureate services to rent space in public schools, the schools took significant steps to ensure that there was no endorsement or *appearance* of school endorsement, including staff participation.<sup>21</sup> Public schools may not use public school time, newsletters, equipment, email, or other resources to advertise, announce, or invite students and their parents to baccalaureates.

## **5. School clubs and athletic teams may not have a “chaplain” or religious counselor.**

Public schools may not offer religious groups or individuals unique access to school property to befriend and proselytize to students because public schools may not advance or promote religion. Accordingly, public school clubs and athletic teams cannot appoint or employ a chaplain, seek out a spiritual leader for the club or team, or agree to have a team chaplain. Renaming a religious figure a “life coach” or other title to “get around” the law does not pass muster. Schools may not allow clergy access to other people’s children under any guise.<sup>22</sup>

Similarly, schools may not allow pastors, religious youth groups, or churches onto school grounds (e.g., in the lunch room) to talk with students.<sup>23</sup>

## **6. Schools may not teach religious doctrine, including creationism or intelligent design.**

The Supreme Court struck down teaching of “scientific creationism” in public schools.<sup>24</sup> Teaching creationism or any of its offshoots, such as intelligent design, in a public school is unlawful. Courts regularly find that such teachings are religious, despite many new and imaginative labels given to the alternatives. Specifically, courts have held that:

- Schools cannot prohibit the teaching of evolution.<sup>25</sup>
- Schools may not read a disclaimer before teaching evolution.<sup>26</sup>
- Schools may prohibit the teaching of creationism because allowing a teacher “to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause.”<sup>27</sup>
- Schools may prohibit “creation science” because they have a responsibility to ensure that teachers are not “injecting religious advocacy into the classroom.”<sup>28</sup>
- “Intelligent design” is a religious belief, not science, and must not be taught in public schools.<sup>29</sup>
- Schools cannot offer “balanced treatment for creation science and evolution science.”<sup>30</sup>

No controversy exists in the scientific community regarding the fact of evolution. Teaching alternative theories or a nonexistent controversy is not only unconstitutional, it is inappropriate. Undermining the teaching of evolution does a great disservice to the scientific literacy of students.

## **7. Schools must charge a fair rent to all organizations that lease school property; churches leasing school property must actually pay that rent and can only use school property during rental hours.**

Granting a fee waiver to a church or religious organization or charging a comparatively lower rental rate is unconstitutional. This preferential treatment forces taxpayers to subsidize the church. Rental rates must be sufficient to minimally cover all extra costs, including AC, electricity, janitorial overtime and clean-up, etc. Otherwise the school violates the Florida Constitution, which prohibits a school from subsidizing a religious organization or church. It

specifically states “[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”<sup>31</sup>

The church may not use school property *in any way* during non-rental hours — including to store equipment, to park a trailer, or to display a sign.

## **8. Schools may not allow the distribution of bibles or religious literature on school property.**

It is unconstitutional for public schools to permit the distribution of bibles or religious literature as part of the public school day. Courts have held that the distribution of bibles to students at public schools is prohibited.<sup>32</sup> In striking down a school district’s policy permitting Gideons to distribute bibles in classrooms, the Seventh Circuit stated, “In permitting distribution of [the Gideon Bible], the schools affront not only non-religious people but all those whose faiths, or lack of faith, does not encompass the New Testament.”<sup>33</sup>

Even passively distributing religious material to students, from a table or some other fixed location, has been held unconstitutional.<sup>34</sup>

To circumvent this rule, some schools have been urged to open a “public forum” for religious literature distributions. However, *any* private organization may use such a forum. This includes atheists, humanists, Satanists, Muslims, and any other group. Allowing religious literature distributions turns the public schools into religious battlegrounds, fraught with solicitation and propaganda. But schools are not required to open these forums. **The best course is to disallow all third-party literature distribution.**

In 2013, FFRF asked the Orange County Public Schools to close a “forum” that was created at the behest of a Christian missionary group. OCPS kept the forum open, then censored many of the materials FFRF later sought to distribute in that forum. After a federal lawsuit, nearly \$90,000 in legal fees, and two years of distraction, the OCPS Board properly and wisely voted to close the open forum. Had the district listened to FFRF as a concerned ally rather than treated us as an adversary, it could have saved a lot of time and money. We urge other public schools to focus on educating students, not providing outside groups with a platform to preach to other people’s children.

## **9. Schools may not force students to stand for or recite the Pledge of Allegiance.**

The Supreme Court ruled over 70 years ago that compelling a student to recite the pledge and salute the flag infringed upon a student’s First Amendment rights.<sup>35</sup> Schools cannot punish students for exercising this right.

Courts, including the Eleventh Circuit, which controls Florida, have repeatedly held that students have a constitutional right **not** to participate in the pledge or stand for its recitation.<sup>36</sup>

## **10. Schools may not disallow atheist or non-believer clubs if other non-curricular clubs are allowed, regardless of whether a staff advisor volunteers.**

Under the Equal Access Act, public secondary schools receiving federal funds cannot discriminate against student groups based on their religious, political, philosophical, or other beliefs.<sup>37</sup> Specifically, the Equal Access Act (EAA) states that:

It shall be unlawful for any public secondary school . . . to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings.<sup>38</sup>

The EAA provides: “A public secondary school has a limited open forum 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.”<sup>39</sup> The school cannot deny an atheist or non-believer club the same rights as other noncurricular student clubs or privilege religious clubs over other clubs.

The Supreme Court has explicitly held that a school’s denial of a student request to form a Christian club violated the EAA where other noncurricular clubs are allowed.<sup>40</sup> The Supreme Court found that denial of official recognition violated the law because school recognition allowed student clubs privileges, such as access to school resources and information channels.<sup>41</sup> The same equal protection applies to nonreligious clubs. If a teacher is not willing to serve as advisor, a school administrator should be assigned to act as one, to ensure the school is protecting and fostering the rights of its students under the EAA.

## **11. Schools may not allow religious displays on school property, including in classrooms and teachers’ displays.**

Courts have continually held that school districts may not display religious iconography such as the Ten Commandments, religious messages, and pictures of Jesus.<sup>42</sup>

Removing religious displays does not violate a teacher’s First Amendment rights. School districts can regulate teachers’ speech while acting in their official capacities because they are speaking for the state, “[b]ecause the speech at issue owes its existence to [his] position as a teacher, [the School District] acted well within constitutional limits in ordering [the teacher] not to speak in a manner it did not desire.”<sup>43</sup> In other words, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications...”<sup>44</sup>

## **12. “Voluntariness” cannot excuse a constitutional violation.**

Schools cannot use voluntariness or a student vote to excuse state-church violations. For instance, schools cannot legally host a religious assembly simply because attendance is “voluntary.” Courts have summarily rejected these arguments, as Justice Brennan noted “the availability of excusal or exemption simply has no relevance to the establishment question . . .”<sup>45</sup>

In conclusion, we sincerely hope that your public school district can use this information to benefit students and protect their rights of conscience. We hope that this information will better equip faculty, staff and administrators to safeguard a captive audience of students from those seeking to impose their religious beliefs upon them, and that your staff will be vigilant in guarding against these impositions.

Thank you for your time and attention to this memo. FFRF would be pleased to answer any questions or provide attorneys to conduct an information in-service to your employees.

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<sup>1</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Epperson v. Arkansas*, 393 U.S. 97 (1967); *Sch. Dist. of Abington Twshp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>2</sup> *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (2000).

<sup>3</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2001) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690) (1984) (O'Connor, J., concurring).

<sup>4</sup> *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015), available at [www.pewforum.org/2015/05/12/americas-changing-religious-landscape/](http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/).

<sup>5</sup> "Nones on the Rise: One-in-Five Adults Have No Religious Affiliation," Pew Research Center, The Pew Forum on Religion & Public Life (October 9, 2012) available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>

<sup>6</sup> Barry Kosmin, National Religious Identification Survey 1989-1990.

<sup>7</sup> *Supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992) (declaring unconstitutional clergy-delivered prayers at a public school graduation); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a school's policy allowing student-delivered prayers at high school football games violates the Establishment Clause).

<sup>10</sup> *Santa Fe*, 530 U.S. 290.

<sup>11</sup> *Santa Fe*, 530 U.S. at 304-305.

<sup>12</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (declaring prayers in public schools unconstitutional); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (declaring unconstitutional devotional Bible reading and recitation of the Lord's Prayer in public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (overturning law requiring daily "period of silence not to exceed one minute . . . for meditation or daily prayer").

<sup>13</sup> See, e.g., *Borden v. Sch. Dist. of the Twp. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), *cert. denied*, 129 S.Ct. 1524 (2009) (declaring the coach's organization, participation and leading of prayers before football games unconstitutional); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding a basketball coach's participation in student prayer circles an unconstitutional endorsement of religion).

<sup>14</sup> *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990).

<sup>15</sup> *Id.* at 253 (citing 20 U.S.C. §§ 4071(c)(3) and (5)).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014) (finding use of church for public school graduations unconstitutional); *Does v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172 (D. Conn. 2010) ("By choosing to hold graduations at [a church], [a school] sends the message that it is closely linked with [the church] and its religious mission, that it favors the religious over the irreligious, and that it prefers Christians over those that subscribe to other faiths, or no faith at all."); *Musgrove v. Sch. Bd. of Brevard Co.*, 608 F. Supp. 2d 1303 (M.D. Fla. 2005) (ruling that plaintiffs had demonstrated likelihood of success on the merits of their claim that holding public high school graduations in a church violates the Establishment Clause).

<sup>18</sup> *Does v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172 (D. Conn. 2010).

- <sup>19</sup> *Elmbrook* at 853-54.
- <sup>20</sup> See, e.g., *Warnock v. Archer*, 443 F.3d 954 (8th Cir. 2006) (upholding injunction prohibiting school district from orchestrating or supervising prayers at school graduation or baccalaureate ceremonies).
- <sup>21</sup> See *Randall v. Pagan*, 765 F. Supp. 793 (W.D.N.Y. 1991) (noting that “the school board has already formally and publicly dissociated itself from the baccalaureate service, has canceled its prior order for programs and has refused to lend any financial support, either direct or indirect, to assist the [religious group] in its sponsorship of the event [and that no] district personnel are involved in any aspect of the service, either in their capacities as District employees or . . . in their personal, individual capacities.”); *Verbena Methodist Church v. Chilton Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) (school must “ensure that no other school officials promote, lead, or participate.”).
- <sup>22</sup> See generally, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2001); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Epperson v. Arkansas*, 393 U.S. 97 (1967); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).
- <sup>23</sup> *Id.*
- <sup>24</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987).
- <sup>25</sup> *Epperson v. Arkansas*, 393 U.S. 97 (1968).
- <sup>26</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 201 F.3d 602 (5th Cir. 2000).
- <sup>27</sup> *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994).
- <sup>28</sup> *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990).
- <sup>29</sup> *Kitzmilller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa 2005).
- <sup>30</sup> *McLean v. Arkansas Bd. of Ed.*, 529 F. Supp. 1255 (D.C. Ark., 1982).
- <sup>31</sup> FLA. CONST. art. I, § 3.
- <sup>32</sup> See *Berger v. Rensselaer Central Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993) (held that classroom distribution of Gideon bibles to fifth-graders violated the Establishment Clause of the First Amendment to the United States Constitution); see also *Tudor v. Bd. of Educ. of Rutherford*, 14 N.J. 31 (1953), *cert. denied*, 348 U.S. 816 (1954) (finding unconstitutional a school board resolution permitting the distribution of bibles by Gideons).
- <sup>33</sup> *Berger*, 982 F.2d at 1170.
- <sup>34</sup> See *Roark v. South Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009).
- <sup>35</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (Murphy, J., concurring).
- <sup>36</sup> See *Holloman v. Harland*, 370 F.3d 1252, 1268 (11th Cir. 2004) (stating that verbally chastising a student for “failing to salute the flag or expressing his opinion in a non-disruptive fashion” would violate the constitution as a matter of law); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003); *Goetz v. Ansell*, 477 F.2d 636, 637-38 (2d Cir. 1973) (holding that students have the right to remain seated during the pledge of allegiance); *Frain v. Baron*, 307 F. Supp. 27, 33-34 (E.D.N.Y. 1969) (schools may not treat “any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate.”).
- <sup>37</sup> *Mergens*, 496 U.S. at 235.
- <sup>38</sup> 20 U.S.C. § 4071(a).
- <sup>39</sup> 20 U.S.C. § 4071(b).
- <sup>40</sup> *Mergens*, 496 U.S. at 247.
- <sup>41</sup> *Id.* at 246. See also *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2001), *cert denied*, 540 U.S. 813.
- <sup>42</sup> See generally, *Stone v. Graham*, 449 U.S. 39 (1980) (ruling that the Ten Commandments may not be displayed on classroom walls); *Lee v. York Cnty.*, 484 F.3d 689 (4th Cir. 2007) (ruling that a teacher may be barred from displaying religious messages on classroom bulletin boards); *Washegesic v. Bloomington Pub. Schs.*, 813 F. Supp. 559 (W.D. Mich. 1993), *aff’d*, 33 F. 3d 679 (6th Cir. 1994) (Jesus picture cannot be displayed in a public school).
- <sup>43</sup> *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1807 (2012) (upholding school order to a teacher to remove two banners with historical quotes referencing “God”).
- <sup>44</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
- <sup>45</sup> See, generally, *Schempp*, 374 U.S. at 288 (Brennan, J., concurring) (“the availability of excusal or exemption simply has no relevance to the establishment question . . .”); *Lee*, 505 U.S. at 596 (“the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”); *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (“VMI cannot avoid Establishment Clause problems by simply asserting that a cadet’s attendance at supper or his or her participation in the supper prayer are ‘voluntary.’ ”); *Santa Fe* at 304-05 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)) (“Fundamental rights may not be submitted to vote; they depend on the outcome of no elections”);