



AT THE MERCY OF THE MAJORITY:

Attacks on Religious Freedom in Texas Public Schools in the Decade after Santa Fe v. Doe

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ACLU of Texas Religious Freedom Campaign

The ACLU of Texas works to promote and protect religious freedom through legal and legislative advocacy and public education. Our goals for this campaign are to:

- ◆ Ensure K-12 public school curricula and textbooks are free from government-sponsored religion;
- ◆ Protect the separation of church and state on public school campuses; and
- ◆ Ensure Texans are able to practice their faiths, or no faith at all, without government interference.

To learn more about the ACLU of Texas Religious Freedom Campaign and how you can participate, please visit <http://www.aclutx.org/strategic-campaigns/religious-freedom/>.

ACLU of Texas Mission

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This report is not intended as legal advice. If you believe your rights have been violated, please seek advice from an attorney or request legal assistance on the ACLU of Texas website, www.aclutx.org.

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Section I – Introduction and Executive Summary

For most of us, public school is our first opportunity to meet and interact with people outside our own immediate families—people who may look different, act different, or have different beliefs from those who are raising us. To the extent American culture is a melting pot, public schools are where many of us first come into contact with the diversity of appearance, culture, and belief that represents the American experience. Public schools also provide our first encounter with the government and official authority, in the form of teachers, administrators, and school boards.

Perhaps, then, it is not surprising that some of the most compelling—and controversial—issues decided by the United States Supreme Court have involved balancing the rights of children and parents against the interests of the government in the public school setting. Beginning in 1925, with its decision in *Pierce v. Society of Sisters*¹—holding that government can compel school attendance but must permit attendance at private religious school to satisfy the requirement—the Supreme Court has regularly been called upon to opine on matters involving public education in general and the intersection of religion and public education in particular. Major cases in this lineage include:

- ◆ *West Virginia Board of Education v. Barnette*,² the Court’s 1943 holding that the First Amendment protects the right *not* to pledge allegiance to the U.S. flag;
- ◆ *Engel v. Vitale*,³ a 1962 decision in which the Court determined it was unconstitutional for a public school to compose an official school prayer and require its recitation;
- ◆ *Abington v. Schempp*,⁴ the 1963 companion to *Engel* in which the Court struck down the practice of Bible reading in public school;
- ◆ *Lee v. Weisman*,⁵ a 1993 case holding that the First Amendment prohibits schools from inviting clergy to deliver graduation prayer; and
- ◆ The most recent case, 2000’s *Santa Fe Independent School District v. Doe*,⁶ which held that school-sponsored prayer at a public high school’s football games violates the First Amendment.

¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

² *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³ *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

⁴ *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963).

⁵ *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

⁶ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

What *is* surprising, however, is the frequency with which schools appear to flout well settled law, particularly in the First Amendment arena.

The ACLU of Texas receives dozens of complaints every year from students, parents, and teachers across Texas reporting that local public schools violate students' religious freedom in a myriad of ways: prohibiting students from wearing religious attire, injecting sectarian religious views into classroom instruction, and even endorsing and requiring student prayer.

Yet most of the complainants are afraid of speaking out, even with the Constitution and the U.S. Supreme Court on their side. They fear if they go public with their concerns, their children will face retaliation at school. They fear social stigma in their towns. They fear loss of their jobs. They fear violence.

The experiences of people who have fought for their rights in communities around the country show that these fears are well founded. For example, after Vashti McCollum brought a suit objecting to the practice of permitting religious classes to be held in public-school classrooms, her home was vandalized, she received hundreds of pieces of hate mail, and her son was physically attacked.⁷ When Joanne Bell and Lucille McCord filed suit to block religious meetings and distribution of Gideons Bibles at their children's schools, their children were branded as "devil worshipers," and the Bells received repeated threats that culminated in their home being burned down.⁸ Lisa Herdahl received death threats after she challenged prayer at her children's public school and was forced to quit her job at a local convenience store. Parents at the school even threatened their own children with beatings if they were caught playing with or talking to the Herdahl children.⁹ Similarly, the children of one of the plaintiffs in a case challenging Bible-reading in schools were beaten on their way home from school, and their house was later fire-bombed.¹⁰ Tyler Deveny, who succeeded in challenging prayer at his high school graduation, was beaten by eight teens, one of whom said "you hate God" before striking Deveny in the face.¹¹ After the Dobrich family challenged their public school's practice of permitting teachers to proselytize and distribute Bibles to non-Christian students, they were driven to move to another county by the constant harassment, anti-Semitic taunts, and threats they endured.¹²

⁷ See ROBERT S. ALLEY, *WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS* 84-89 (1996).

⁸ *Id.* 106-08.

⁹ Stephanie Saul, *A Lonely Battle in the Bible Belt: A Mother Fights to Halt Prayers at Mississippi School*, *NEWSDAY*, Mar. 13, 1995, at A8.

¹⁰ ALLEY, *supra* note 7, at 98.

¹¹ Charles Shumaker, *Student Beaten For Prayer Suit, He Says*, *CHARLESTON GAZETTE & DAILY MAIL*, June 19, 2002, at 6D.

¹² David Bario, *A Lesson in Tolerance*, *AM. LAWYER*, July 2008, at 122.

Too often, even school boards and officials are intimidated by what they perceive as community religious sentiment and fail to follow the law and their own policies. In other cases, elected trustees, administrators, and teachers are all too willing to impose their personal religious beliefs on impressionable students.

This report documents the degree and persistence of conduct that impinges on students' religious liberty. The ACLU of Texas reviewed complaints we received from the 2009-2010, 2010-2011, and 2011-2012 school years—a decade after the Supreme Court's last major opinion on the role of religion in public schools, *Santa Fe Independent School District v. Doe*. We also reviewed public information about religious freedom in Texas public schools, including reports and lawsuits brought by other First Amendment advocates, including the Texas Freedom Network, the Freedom From Religion Foundation, and Americans United for the Separation of Church and State.

The purpose of this report is threefold:

1. To explain the legal principles that govern public schools' conduct and the rights of students after *Santa Fe*, including the application of Texas's Religious Freedom Restoration Act (1999), Bible Curriculum Act (2007), and Religious Viewpoint Anti-Discrimination Act (2007);
2. To share our findings that schools routinely interfere with students' freedom to worship—or not—according to their own conscience, creating an atmosphere of intimidation and even fear; and
3. To recommend ways administrators, parents, students and advocates can work together to ensure the constitutional guarantee of religious freedom is protected and respected in Texas public schools.

Background: *Santa Fe Independent School District v. Doe*

The landmark Supreme Court case, *Santa Fe Independent School District v. Doe*, originated in Santa Fe, Texas, a small town located southeast of Houston in Galveston County, close to the Gulf Coast. It has approximately 10,000 residents, of whom approximately 93 percent are white¹³ and the majority of whom are Baptist. The school district is comprised of two elementary schools, one middle and one high school, and was described by a resident at the time of the lawsuit as a “white flight district.”¹⁴ A student in the district noted that, in the 1990s, the town was “more known for prejudice than religiousness.” Santa Fe has a history of Ku Klux Klan activity that culminated in several local cross burnings in an effort to drive out Vietnamese fishermen in 1981.¹⁵

¹³ <http://quickfacts.census.gov/qfd/states/48/4865726.html>.

¹⁴ Claudia Kolker, *Pray*, HOUSTON PRESS, Sept. 14, 1995, <http://www.houstonpress.com/1995-09-14/news/pray/>.

¹⁵ *Id.*

In April 1995, two families whose children attended school in the Santa Fe Independent School District filed a lawsuit in federal court, alleging that the school district violated the First Amendment's prohibition against government establishment of religion.¹⁶ One of the families was Catholic, the other Mormon, and both were in the religious minority in the district.¹⁷ On behalf of their children, they challenged the constitutionality of a number of school's practices, including chastising children who held minority religious beliefs; proselytizing during the school day; permitting the distribution of Gideon Bibles at school; conducting prayer at graduation; and polling the student body about whether to conduct prayer before football games.¹⁸ The Galveston-based attorney who represented the families, Anthony Griffin, did so as a cooperating attorney with the ACLU of Texas.

Because the families feared that asserting their constitutional rights to be free from religious coercion would put them in danger, the court allowed them to proceed anonymously, as "Doe" plaintiffs. The families' fears were well founded: the speculation was so intense that before the case went to trial in the summer of 1996, the district court judge issued an unusual order specifically instructing the school district's representatives not to reveal the families' identities to anyone for any reason and threatening anyone who violated the order with contempt, including incarceration.¹⁹

On December 13, 1996, the district court issued its findings, concluding that teachers and employees of the Santa Fe Independent School District had violated the children's rights in the numerous ways:

- ◆ The district historically had promoted and encouraged religious clubs and given preference to religious clubs over other clubs²⁰;
- ◆ The Gideons were given preferential treatment to distribute their Bibles at Santa Fe Independent School District campuses²¹;
- ◆ A seventh grade teacher made disparaging remarks about one of the student's religion, including describing it as a "cult," which prompted other students to question whether they should continue their friendships with that student;
- ◆ The same teacher handed out a flier during class advertising a religious "revival" event²²;

¹⁶ *Santa Fe*, 530 U.S. at 294-95.

¹⁷ *Id.* at 294.

¹⁸ *Id.* at 295.

¹⁹ The specific language of the order is as follows: "[The District's representatives] ARE NOT TO REVEAL PLAINTIFFS' IDENTITIES TO ANYONE FOR ANY REASON WHATSOEVER, UNDER THIS AND PRIOR ORDERS OF THE COURT, AND UNDER THE HARSH PENALTIES OF CONEMPT DESCRIBED BELOW; . . . FAILURE OF ANY INDIVIDUAL TO ABIDE BY THE EXACT TERMS OF THIS AND PRIOR ORDERS SHALL SUBJECT THAT PERSON TO A FINDING OF CRIMINAL CONTEMPT, THE PENALTY FOR WHICH MAY INCLUDE INCARCERATION. The Court retains jurisdiction in perpetuity to enforce the terms of this Order." Order at 12-13, *Doe v. Santa Fe Indep. Sch. Dist.*, No. G-95-176 (S.D. Tex. Jul. 22, 1996).

²⁰ Findings of Fact and Conclusions of Law ¶ 53, *Santa Fe*, No. G-95-176 (Dec. 13, 1996).

²¹ *Id.* ¶ 44.

²² *Id.* ¶¶ 4, 6.

- ◆ An elementary school teacher taught her class to sing a song about Jesus’s love in sign language²³; and
- ◆ Another elementary school teacher sent a letter home with all her students noting among other things, that students with a “strong religious background” are most successful in school.²⁴

The case eventually reached the U.S. Supreme Court, by which point the issues in dispute had been narrowed so that the only question before the Court was whether the district’s policy of encouraging student-led prayer at football games constituted an illegal government endorsement of religion. In 2000, the Court ruled in favor of the families, holding that student-led prayer resulting from student polling and endorsed by the school violated the Establishment Clause of the First Amendment. The *Santa Fe* case stands for the important proposition that, even if the majority in a community shares the same faith, the majority cannot co-opt public institutions such as schools to impose that faith on the minority who do not share it.

Executive Summary

Our review of the practices of schools in districts across the state indicates that—nearly 17 years after *Santa Fe* was first filed, and nearly 12 years since the Supreme Court’s opinion—many Texas school districts continue to violate the First Amendment in ways remarkably similar to the violations catalogued by the trial court in *Santa Fe*. Often these practices are not only violations of the First Amendment, but also violations of school districts’ own internal policies and Texas law regarding religious freedom.

As documented in this report, Texas public schools still struggle with religious freedom:

1. Failing to Accommodate Students’ Free Exercise of Religious Beliefs.

Several school districts refused to accommodate students’ wearing of religious attire, such as American Indian boys with braids or students wearing rosaries. This conduct contravenes the First Amendment, the Texas Constitution, and the Texas Religious Freedom Restoration Act.

2. Leading, sponsoring, or encouraging prayer in the classroom and/or at school events.

Many school districts have problematic practices concerning prayer at school events. For example, schools continue to include prayer in the official program of important school events, or to poll the student body on the question of whether these events should feature prayer. Both of these practices constitute impermissible sponsorship of prayer.

²³ *Id.* ¶¶ 18-19.

²⁴ *Id.* ¶ 33.

3. Offering sectarian, proselytizing courses on the Bible as part of the school curriculum.

A number of school districts have offered Bible courses to their students in recent years. At least two districts are using a sectarian, proselytizing commercial curriculum that has been the subject of litigation in Texas and invalidated by at least one federal court. Many other districts use locally developed courses, the constitutionality of which can only be determined by individual review. The ACLU of Texas reviewed one of these courses and found egregious problems.

4. Permitting outsiders, particularly Gideons, to distribute Bibles at school.

In 2009, the ACLU of Texas published an investigative report examining the disruption and religious harassment that can occur when school districts allow outside groups, such as Gideons, unfettered access to school property in order to proselytize and distribute religious material. In the few short years since that report was published, the ACLU of Texas identified yet more school districts that allowed outside groups to distribute Bibles on campus in ways that made students feel compelled to take one or otherwise disrupted the learning environment.

5. Displaying religious imagery, symbols, and messages on school grounds.

The problem of religious imagery, symbols, and messages in Texas schools is widespread and difficult to quantify. Even an attempt to question the appropriateness of a religious display in public school can spur vehement opposition. For example, in one district, a simple inquiry from the ACLU of Texas into the origin of a sign with a religious message prompted a school official to write, “The ACLU can take that banner down over my dead body.” Unfortunately, administrators often fail to recognize that permitting religious indoctrination at school not only usurps the role of parents and faith leaders to determine what to teach their children about religion, but also may alienate or intimidate students with differing religious views.

6. Holding school functions in religious facilities.

The ACLU of Texas investigated school districts where significant school events—such as graduation ceremonies—were held in religious venues. Many districts appear to use religious buildings as a first resort rather than a last when there is no neutral option. For example, one high school in Dallas used a church for its 2012 graduation ceremonies despite acknowledging that alternative, non-sectarian locations were available.

Section II – Methodology

In the years since *Santa Fe*, the role of religion in Texas public schools has remained contentious. To compile this report, the ACLU of Texas utilized information from the following resources:

- ◆ **Our complaint database.** The ACLU of Texas receives hundreds of complaints a month on-line via our website, www.aclutx.org. To the extent that this report includes information about complaints, identifying information has been changed to protect the privacy of the complainants.
- ◆ **Public Information Act (PIA) requests.** The ACLU of Texas submitted open records requests pursuant to the Texas Public Information Act to school districts around the state about their policies and practices.
- ◆ **Advocacy organizations.** We also surveyed reports by other advocacy organizations, including Texas Freedom Network, Freedom From Religion Foundation, and Americans United For Separation of Church and State.
- ◆ **Media reports.**
- ◆ **State and federal court cases.**

Section III – General Legal Principles

A. Constitutional Protections

1. Federal Constitution

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

U.S. Constitution, Amendment I

The freedom to worship—or not—according to one’s own conscience is the very first freedom guaranteed to us by the Bill of Rights of the U.S. Constitution. Each clause of the First Amendment has an important and distinct role to play in ensuring that freedom:

- ◆ The **Establishment Clause** prohibits the government from engaging in activity that favors, supports, endorses, or advances religion.
- ◆ The **Free Exercise Clause** protects each individual’s right to practice freely his or her religion of choice, or no religion at all.
- ◆ The **Free Speech Clause** protects an individual’s right to express his or her views on religion.

The Free Exercise and Free Speech clauses protect the liberty of individuals and are therefore permissive. In the public school context, these clauses operate to protect students’ rights to exercise and express their religious beliefs or non-belief.

The Establishment Clause, however, is prohibitive—it prevents the government from sanctioning or promoting religion. Although the Establishment Clause governs the activities of the government, it is as important a safeguard for individual religious liberty as the Free Exercise and Free Speech clauses. As the Supreme Court explained: “By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, 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.”²⁵

²⁵ *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962).

The First Amendment applies to Texas public schools, which are, of course, government funded and operated.²⁶ This means that Texas public schools are subject to the Establishment Clause and cannot take any action that would appear to endorse or advance religion. It also means that Texas public school students enjoy First Amendment protection of their speech and religious practice.

2. Texas Constitution

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

Texas Constitution, art. I, § 6.

The Texas Constitution, like the U.S. Constitution, protects religious freedom and prohibits the state government from endorsing or advancing a religion. Thus, the Texas Constitution not only guarantees the rights of individuals, including students, to practice their religion of choice, or practice no religion at all, but also prevents the government, including public schools, from becoming too entangled with religion and thus sending the message that any particular religion is correct or mandatory.

When these constitutional principles are observed, both students and faculty are allowed to follow their own faiths, or refrain from religious activity, without coercion or entanglement from school or government officials.

B. Statutory Protections

In the decade and a half since *Santa Fe* was filed in 1995, the Texas Legislature has passed four significant pieces of legislation that impact students' religious freedom. Unfortunately, our findings show that these laws have produced mixed results at best. While legislators may have believed that these new statutes would enhance individual freedom, in some cases, the opposite has proved true.

²⁶ *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 215 (1963) (noting that the First Amendment applies to public schools through the operation of the Fourteenth Amendment).

In 1995, the Texas Legislature amended **Texas Education Code Section 25.901** to provide that public school students have an “absolute right” to individual, voluntary prayer—as long as it does not disrupt a school activity—but that they may not be forced to pray nor to refrain from prayer.²⁷

In 1999, the Texas Legislature passed the **Texas Religious Freedom Restoration Act** (TRFRA), which prohibits public schools from substantially burdening students’ free exercise of religion without a compelling reason for doing so.²⁸ Just as under the Free Exercise Clause of the First Amendment, the phrase “free exercise of religion” under TRFRA means an individual’s “act or refusal to act that is substantially motivated by sincere religious belief.”²⁹ Of course, students who choose to refrain from any sort of prayer or religious observance deserve the same level of respect and protection as students who wish to engage in such activities.

The **Religious Viewpoints Antidiscrimination Act** (RVAA), passed in 2007, requires all school districts in Texas to “treat a student’s voluntary expression of a religious viewpoint . . . on an otherwise permissible subject in the same manner [as] a student’s voluntary expression of a secular or other viewpoint.”³⁰ The RVAA also *requires* schools to establish a limited public forum for student speakers to conduct religiously themed public speech.³¹ Although the RVAA appears benign—after all, the First Amendment also prohibits discrimination against religious viewpoints—schools can and have misused the statute to favor certain religious messages. In these cases, the RVAA actually *impedes* religious liberty, rather than protects it.

In 2007, the Texas Legislature passed the **Act on Bible Electives**, which specifically permits—but does not require—public schools to offer a stand-alone Bible course to students in grades 9-12.³² The Act went into effect with the 2009-2010 school year.³³ Although the Act envisions that Bible courses will cover the literary, historical, and cultural impact of the Bible³⁴—a limitation on scope required to comply with state and federal law, including the First Amendment³⁵—the Texas Legislature and State Board of Education have failed to ensure that schools are creating and offering appropriately secular Bible electives.³⁶ For example, although the Act requires Bible course teachers to complete

²⁷ TEX. EDUC. CODE § 25.901.

²⁸ TEX. CIV. PRAC. & REM. CODE § 110.001.

²⁹ *Id.*

³⁰ TEX. EDUC. CODE § 25.151.

³¹ *Id.* § 25.155.

³² *Id.* § 28.011.

³³ 2007 Tex. Sess. Law. Serv. Ch. 856 (H.B. 1287).

³⁴ TEX. EDUC. CODE § 28.011(b).

³⁵ *Id.* § 28.011(d).

³⁶ See, e.g., AM. CIV. LIBERTIES UNION FOUND. OF TEX., THE TEXAS STATE BOARD OF EDUCATION: A CASE OF ABUSE OF POWER (Frank Knaack ed., May 23, 2010), available at <http://www.aclutx.org/files/051310ACLUofTexasSBOEReport.pdf>.

special training on how to teach about the Bible without violating students' religious freedom,³⁷ the Texas Legislature failed to appropriate funds to pay for the training. Moreover, the State Board of Education developed no curriculum standards to guide school districts in creating Bible course content, instead directing that Bible courses could follow existing standards for Independent Study in English or Special Topics in Social Studies. These standards do not provide specific guidance to teachers on the appropriate curriculum or how to teach the Bible literacy elective without running afoul of the First Amendment.

C. Constitutional “Tests” for Evaluating Potential Violations of the Establishment Clause

Many people—including students and their parents—feel strongly about religion. It is not surprising that the issue of religion in public schools is frequently litigated. Courts have developed a number of tests to help decide whether the government's action in a particular case violates the Establishment Clause. An action violates the Establishment Clause if:

- ◆ It does not have a genuine secular purpose⁴⁰;
- ◆ Its primary effect is the promotion or inhibition of religion⁴¹;
- ◆ It creates excessive entanglement between government and religion⁴²;
- ◆ It appears to endorse a particular religious belief⁴³; or
- ◆ It effectively forces people to participate in a religious exercise.⁴⁴

Whether a policy, practice, or action is constitutional often depends on the specific facts. The next section details the specific legal standards that apply to some of the most common situations—such as school prayer—and reports what we found out about whether Texas schools are following the law.

³⁷ TEX. EDUC. CODE § 28.011(f).

³⁸ Joy Baskin, *Before Bible Class Begins: Debate over Bible Curriculum in Public Schools Shines Spotlight on Texas*, TEXAS LONE STAR, Mar. 2008, http://www.tasb.org/services/legal/esource/instruction/documents/rel_bibcurr.tx.pdf.

³⁹ 19 TEX. ADMIN. CODE § 74.36(d)-(e).

⁴⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *County of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573, 593-94 (1989).

⁴⁴ *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

Section IV – Findings

A. Religious Dress and Free Exercise

1. Legal Standards Governing Religious Dress

According to the *Texas Almanac*, 15 million of the approximately 25 million residents of Texas identify with a religious faith as of 2010.⁴⁵ There are over 100 different faith traditions represented, including Protestant, Buddhist, Catholic, Mormon, Jewish, Muslim and Sikh.⁴⁶ This diversity contributes to the state’s vibrant culture.

Some of these religious traditions may have dress or grooming requirements—such as a rosary, hijab, yarmulke, or turban—that conflict with a standard school dress code. As a general matter, dress codes have been upheld by courts on the grounds that schools have a legitimate interest in instilling discipline, teaching respect for authority, promoting hygiene and minimizing distraction caused by unusual hair or dress.⁴⁷ But the First Amendment and the Texas Religious Freedom Restoration Act (TRFRA) require schools to make exceptions to their dress codes for religious attire. These exceptions are necessary to allow students with sincerely held religious beliefs freely to exercise those beliefs through religious dress.⁴⁸ They also protect students’ rights to engage in religious speech under the Free Speech Clause.⁴⁹

As a result, public schools may not prohibit religious dress unless there is a compelling reason to do so, or unless the religious dress substantially disrupts or interferes with the school’s activities.⁵⁰ This is a very high standard for a public school to meet. Many courts have found that a school’s interest in enforcing a standard dress code, without more, is not sufficient to deprive students of their right to wear religious dress.⁵¹

⁴⁵ Tex. State Historical Ass’n, *Religious Groups in Texas*, TEX. ALMANAC, <http://www.texasalmanac.com/sites/default/files/images/religionchartA.pdf> (last visited Apr. 10, 2012).

⁴⁶ *Id.*

⁴⁷ See *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 511 (5th Cir. 2009).

⁴⁸ *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 272 (5th Cir. 2010) (holding that TRFRA protected American Indian kindergarten student’s right to wear hair in two long braids as expression of his religious beliefs).

⁴⁹ *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 665-66 (S.D. Tex. 1997) (analyzing students wearing of rosaries as “pure speech”).

⁵⁰ TEX. CIV. PRAC. & REM. CODE § 110.003; *Betenbaugh*, 611 F.3d at 265-66; *Chalifoux*, 976 F. Supp. at 666.

⁵¹ *Betenbaugh*, 611 F.3d at 268 (holding that district’s general interests in enforcing grooming standards alone not compelling enough under TRFRA to prevent Native American kindergarten student from openly wearing his hair long); *Chalifoux*, 976 F. Supp. at 671 (holding that school’s dress code prohibiting the wearing of rosaries violated students’ Free Speech and Free Exercise rights). *But cf. Menora v. Illinois High Sch. Ass’n*, 683 F.2d 1030, 1035-36 (7th Cir. 1982) (holding that high school sports association rule prohibiting students from wearing yarmulkes affixed with bobby pins to avoid potential harm to other players did not violate Jewish students’ Free Exercise rights as long as students had other option to cover their heads as required by faith).

2. Reported Religious Dress and Free Exercise Violations

In recent years, the ACLU of Texas has received a number of complaints from students about school dress codes that infringe upon their rights to freely exercise their religion.

Problems arise when public school personnel are unaware of the legal obligations schools have to accommodate religious attire, when school personnel are aware of the law but uncertain how to provide an accommodation, or when they simply refuse to do so.

a. American Indian Boys: Exemptions for Hair Length

For example, many American Indian boys identify their hair as part of their spiritual practice and choose to keep their hair long. This practice conflicts with a common provision in many Texas public school dress codes requiring boys' hair to be cut neatly above the eyebrows in front, above the ears on the side, and above the collar in the back.

Administrators at Needville ISD, southwest of Houston, first told parents of an American Indian kindergarten student that their son absolutely had to cut his hair to enroll in public school. The boy, like his father, wore his hair in two braids; his hair had never been cut. According to the superintendent, Curtis Rhoads:

A school district is a reflection of the community. We've consistently been very conservatively dressed, very conservatively disciplined. It's no secret what our policy is: You'll cut your hair to the right point. You'll tuck in your shirt. You'll have a belt If you want to think we're backwards . . . no one is asking you to move to Needville and have these opinions invoked on you.⁵²

After the parents sought an exemption and appealed to the school board, the board decided to "accommodate" the family's American Indian religious beliefs by allowing the kindergarten student to keep his hair long but requiring him to bind it into a single braid and stuff it down his shirt during the school day.⁵³ He and his parents refused to comply with the board's punitive policy.⁵⁴ The school district segregated this 5-year-old boy from his classmates and placed him in In-School Suspension (ISS) because he was in violation of the dress code.⁵⁵ As the boy's father, Kenny Arocha, explained, "I hated the thought of my kindergartner being segregated from his classmates, but I knew I had to teach him the importance of standing up for our beliefs."

⁵² Paul Knight, *Native American Family Fights Hair Length Rules*, HOUSTON PRESS, July 9, 2008, <http://www.houstonpress.com/2008-07-10/news/a-native-american-family-fights-against-hair-length-rules/>.

⁵³ *Betenbaugh*, 611 F.3d at 256.

⁵⁴ *Id.* at 257.

⁵⁵ *Id.*

The ACLU of Texas, along with the ACLU's national project on the Freedom of Religion and Belief, filed a federal lawsuit to protect this student's constitutional right to wear his hair in accordance with his religious beliefs—and won. In 2010, the Fifth Circuit Court of Appeals ruled that the district failed to comply with the Texas Religious Freedom Restoration Act and could not prevent the child from wearing traditional long braids in school.⁵⁶

Other school districts where administrators reportedly refused to accommodate American Indian male students' hair length include:

- ◆ Spring ISD. In 2011, the father of an American Indian middle school student was told that if his son came to school with his braided hair down, the school personnel would stuff the child's hair inside his shirt or put it in a bun on the top of his head. After family members called the school to complain, school officials apologized and granted the child an exemption to the dress code.
- ◆ ISD near Houston. In 2009, the mother of an American Indian student sought help from the ACLU when school officials ordered her son to cut his long hair.⁵⁷
- ◆ Somerset ISD. In 2009, a student at Somerset High School was placed in ISS for several weeks because he refused to cut his hair.⁵⁸ After his family filed a federal lawsuit, the student was released from ISS and allowed to return to class.⁵⁹
- ◆ Clint ISD. In 2010, an American Indian junior at Mountain View High School was told that he had to cut his hair. After his father complained to the press, the school district announced that "Clint ISD respects the cultural and religious beliefs of our students. Clint ISD dress and grooming rules do allow for an exemption to the district's established standards, if such exemption request is made in writing." The father reported he had never been told he needed to make the request in writing.⁶⁰

Fortunately, many school districts do accommodate religious attire with dress code exemptions, and others can be persuaded to reconsider by persistent advocates. For example, in late 2011, the ACLU of Texas received a complaint from a school district near a major metropolitan area regarding a Native American high school student who was

⁵⁶ *Betenbaugh*, 611 F.3d at 272-73.

⁵⁷ Am. Civil Liberties Union of Tex. intake files.

⁵⁸ Complaint ¶¶ 24, 30, *Figueroa v. Somerset Ind. Sch. Dist.*, No. SA-09-CA-212-FB (W.D. Tex. Mar. 19, 2009).

⁵⁹ Order Granting Motion for Temporary Restraining Order at 3, *Figueroa*, No. SA-09-CA-212-FB (Mar. 20, 2009); Defendant's Advisory to the Court. at 1-2, *Figueroa*, No. SA-09-CA-212-FB (Apr. 28, 2009); see also *Native American Texas Student Can Keep Long Hair*, KWTX TV, Apr. 14, 2009, <http://www.kwtx.com/home/headlines/42964777.html>.

⁶⁰ Marissa Monroy, *Long Hair Stirring Controversy at Clint ISD*, KVIA.com, Aug. 24, 2010, <http://www.kvia.com/news/24520458/detail.html>.

denied an exemption under the school dress code in order to keep his long hair.⁶¹ The ACLU of Texas was able to work with the school district's counsel to get the religious exemption the student needed—saving taxpayers the cost of lengthy litigation, and allowing the student to exercise his religious beliefs.⁶² And in 2010, a school district near San Antonio—which had initially suspended a Native American preschooler for three days for wearing his hair in a braid—finally capitulated and allowed the boy to wear his hair in accordance with his sincere religious beliefs after a federal court sided with the Arocha family and the ACLU in their fight against Needville ISD.⁶³

b. Students' Right to Wear Rosaries and Crosses

Another common problem involves prohibitions on the wearing of rosaries or crosses at school—prohibitions that weigh particularly heavy on Catholic students. These prohibitions are often justified by the claim that rosaries and crosses have become symbolic of gang affiliation and the belief that barring them helps to keep the school safer. Unfortunately, our review indicates that in at least of some of these instances, school districts banned rosaries and crosses without any evidence whatsoever to suggest that rosaries and crosses had, in fact, been used by gangs in those communities. Of course, even if a school district could support such claims factually, that still would not answer the legal question: whether the banning of the religious symbol is the least restrictive means to accomplish some compelling purpose.

For example, in October 2011, Brownsville ISD announced a policy banning students from wearing rosaries or crosses.⁶⁴ One Brownsville school official admitted that the policy was not prompted by any instances of confirmed gang activity or affiliation, and that rosaries in his school are usually worn as religious symbols.⁶⁵ Thus, it appears that Brownsville decided to infringe the religious rights of its students—including at least one student who complained directly to the superintendent⁶⁶—out of nothing more than unsubstantiated fear. The First Amendment and TRFRA demand better. Other examples include:

- ◆ Dallas ISD: In 2008, security guards at a Dallas-area high school instructed a female student to remove her rosary beads on two separate occasions.⁶⁷ When the student and her mother complained to local press, Dallas ISD defended the guards'

⁶¹ Am. Civil Liberties Union of Tex. intake files.

⁶² Am. Civil Liberties Union of Tex. intake files.

⁶³ Am. Civil Liberties Union of Tex. intake files.

⁶⁴ Manuel De La Rosa, *Brownsville School Cracking Down on Wearing Crosses, Rosaries*, KRGV.COM, Oct. 28, 2011.

⁶⁵ Madeline Buckley, *Law enforcement advising schools to curb wearing of crosses, rosaries*, THE MONITOR, Nov. 2, 2011, <http://www.themonitor.com/articles/around-56245-beads-rosary.html>.

⁶⁶ Am. Civil Liberties Union of Tex. intake files.

⁶⁷ *Texas High School Student Told Rosary is 'Gang Symbol'*, FOXNEWS.COM, Sept. 16, 2008, <http://www.foxnews.com/story/0,2933,423143,00.html>.

actions, stating that principals had discretion over whether to ban rosaries at their respective campuses.⁶⁸

- ◆ Texas City ISD: In 2010, a school police officer in Texas City confiscated a necklace with a cross from a middle school student. The district claimed that the item was taken away because of its resemblance to a rosary.⁶⁹
- ◆ Alief ISD: In 2011, the ACLU received a complaint that O'Donnell Middle School in Houston was harassing an 8th-grade student for wearing a rosary at school.⁷⁰ The student had been forced on several occasions to remove his rosary before he was allowed to go to class.⁷¹ This same school had tried to prevent the student from wearing a necklace with a cross the year before, but relented after his mother asserted his constitutional rights.⁷²
- ◆ Fort Bend ISD: Also in 2011, the principal at Hodges Bend Middle School in Houston suspended an 8th grade student after she refused to stop wearing a rosary to school.⁷³ At first, Fort Bend ISD publicly supported the principal's decision to discipline the 14-year-old girl for violating the district's student dress code.⁷⁴ But after the American Center for Law and Justice sent a letter to the district championing the girl's First Amendment right to wear a rosary to school, the district agreed to expunge the suspension from her records and to allow her to wear the rosary in the future.⁷⁵

c. Other Religious Dress

The ACLU of Texas has received complaints from families of other faiths whose children have been told they cannot wear religious dress to school. For example, in 2009, the parent of a Hindu student in one school district reported that her daughter was told she could not wear her nose piercing to school.⁷⁶ That same school year, after Sikh families from multiple districts reported that their children were experiencing problems at schools relating to the turbans worn by Sikh boys, the ACLU of Texas sent a letter to 27 school

⁶⁸ *Id.*

⁶⁹ Rucks Russell, *Texas City student banned from wearing cross necklace*, KHOUNEWS, May 14, 2010, <http://www.khou.com/news/texas-news/khou-93810709.html>.

⁷⁰ Am. Civil Liberties Union of Tex. intake files.

⁷¹ Am. Civil Liberties Union of Tex. intake files.

⁷² Am. Civil Liberties Union of Tex. intake files.

⁷³ Rucks Russell, *Texas 8th grader suspended after wearing rosary to school*, KMOV.COM, Jan. 13, 2011, <http://www.kmov.com/news/national/Texas-8th-grader-suspended-after-wearing-rosary-to-school-113528714.html>.

⁷⁴ *Id.*

⁷⁵ Jay Sekulow, *TX Free Speech Win for Student Wearing Rosary*, AM. CENTER FOR LAW & JUST., Feb. 13, 2011, <http://aclj.org/school-prayer/tx-free-speech-win-for-student-wearing-rosary>.

⁷⁶ Am. Civil Liberties Union of Tex. intake files.

districts reminding them of their obligations under the Texas Religious Freedom and Restoration Act and the First Amendment.⁷⁷

Two years later, after complaints continued to roll in about suppression of free exercise and religious attire in schools all over the state, the ACLU of Texas sent a letter to **all 1,029 Texas public school districts**, explaining the requirements of the Texas Religious Freedom Restoration Act.

B. Prayer at School Events

1. Legal Standards

One often hears the claim that prayer has been “banished” from public schools, but that is not the law. What is prohibited is school officials dictating or endorsing particular forms of prayer or putting students in the position of having to listen to prayer that may conflict with their personal religious convictions. The right of the individual student to pray or not according to his or her own conscience is paramount.

Public school officials—as government employees—may not lead students in prayer, invite clergy to pray at school events, or request students to pray.⁷⁸ All of these actions are considered **endorsement** of religion by the school and are prohibited by the Establishment Clause.⁷⁹ Voluntary, individual prayer by students, however, is allowed, as long as it does not interfere with instructional time or cause a disruption. This is because voluntary, individual prayer by students is protected under the Free Speech Clause and Texas law.⁸⁰

Some schools have tried to get around the prohibition that schools cannot directly endorse or engage in prayer by having students vote on whether to have prayer at school functions, such as football games, and on who should deliver the prayer. In *Santa Fe Independent School District v. Doe*, the ACLU of Texas fought one of these schools all the way to the Supreme Court. The Court found that the school—by setting up the election and providing the stage for a student to lead prayer—was still coercing students to pray.⁸¹ The Court also said that the election itself was unconstitutional because it allowed a

⁷⁷ Letter from Am. Civ. Liberties Union Found. of Tex. to School Administrators (October 2009), available at <http://aclutx.org/files/101509UnitedSikhs%20and%20ACLUTX%20SchoolLetters.pdf>.

⁷⁸ *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (holding school’s invitation of a rabbi to lead non-sectarian prayer at graduation ceremony unconstitutional); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226-27 (1963) (finding teacher-led prayer and Bible readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (holding that New York’s practice of having students recite prayer at the beginning of each school day violated the Establishment Clause).

⁷⁹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (explaining that “the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer”).

⁸⁰ TEX. EDUC. CODE § 25.901; *Santa Fe*, 530 U.S. at 302, 307; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); U.S. DEP’T OF ED., GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (Feb. 7, 2003), available at http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

⁸¹ *Santa Fe*, 530 U.S. at 317.

majority of students to coerce a minority of students into hearing or participating in prayer that conflicted with their religious beliefs.⁸²

Although schools cannot invite students to pray, or hold an election for students to vote on whether to include prayer at school events, students themselves do have the right under the Religious Viewpoints Antidiscrimination Act (RVAA) to include religious messages in a graduation or similar speech.⁸³ Even setting aside concerns over whether permitting such religious messages in school unconstitutionally forces religion on *other* students, schools must take care to communicate that these are solely the student's views. The school must be absolutely clear that it does not sponsor or endorse student religious speech.⁸⁴ At a minimum, school officials cannot encourage a student to pray; cannot dictate, suggest, or edit what a student should say; and must include a disclaimer on graduation or other event programs indicating that the school does not sponsor student religious speech.

2. Reported Violations

The rules regarding prayer in schools boil down to this: students may pray of their own accord—as long as they do not disrupt others—but school officials may not. This means that school officials may not themselves pray to students; may not invite others to pray to students; and may not encourage, sponsor, endorse, or coerce student prayer. Unfortunately, the ACLU of Texas has found that too many Texas school officials are either unaware of these rules or deliberately break them.

a. School Employees Leading Students in Prayer

The most straightforward of these rules is that school officials may not pray to or with students while acting in their capacity as employees of the state. This rule protects students from coercion. The Supreme Court case laying out this rule—*Engel v. Vitale*—is nearly half a century old.⁸⁵ Nevertheless, teachers and administrators in Texas public schools continue to violate this rule.

For example, in September 2011, the ACLU of Texas received a complaint that a sixth grade teacher in Pittsburg ISD regularly opened class with prayer.⁸⁶ After multiple parents complained about the practice, the school informed the teacher that he was not allowed to lead students in prayer.⁸⁷ Thereafter, the teacher apparently asked student volunteers

⁸² *Id.* at 316-17.

⁸³ TEX. EDUC. CODE § 25.151.

⁸⁴ *Santa Fe*, 530 U.S. at 302; *Lee v. Weisman*, 505 U.S. 577, 589 (1992). *But cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-86 (1986) (explaining that public schools are allowed to review speeches for vulgarity, lewdness, or sexually explicit language, but may not administer rules to discriminate against student religious prayer or speech).

⁸⁵ *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

⁸⁶ Am. Civil Liberties Union of Tex. intake files.

⁸⁷ Am. Civil Liberties Union of Tex. intake files.

to lead the daily prayer.⁸⁸ The teacher's actions did nothing to lessen the constitutional violation. A school official is no more permitted to encourage or invite student prayer than he is permitted to lead the prayer himself.⁸⁹

Other districts where teachers have reportedly asked students to participate in prayer include:

- ◆ El Paso ISD. In early 2012, the Freedom From Religion Foundation intervened after receiving complaints of school-sponsored group prayer among the Bowie High School football team prior to football games.⁹⁰ A video of one these group prayers had been posted online and showed a member of the local clergy leading the entire team, kneeling and with their heads bowed, in Christian prayer.⁹¹ After receiving the Freedom From Religion Foundation's letter, the district "directed all personnel to refrain from facilitating any and all prayers which are led by clergy members and/or school officials."⁹²
- ◆ Grand Prairie ISD. At the 2011 Annual Awards Ceremony at Grand Prairie Ninth Grade Center, a school board member apparently delivered an invocation ending with the words, "In Jesus's name we pray, amen." The choir then sang the hymn, "We are Marching in the Light of God." After the Freedom From Religion Foundation wrote the school district to complain, the district agreed that the invocation was inconsistent with district policy and that it would share an alternative secular song, "We are Standing in the Light of Peace," with the choral directors.⁹³
- ◆ Socorro ISD. In 2011, the girls' soccer coach at Montwood Middle School was called out by the Freedom From Religion Foundation for leading her team in prayer before games.⁹⁴ Around the time that the organization complained to the district, the coach resigned her position.⁹⁵
- ◆ Magnolia ISD. In August 2010, a student reported to the ACLU of Texas that the principal openly prayed at a student pep rally on campus.⁹⁶

⁸⁸ Am. Civil Liberties Union of Tex. intake files.

⁸⁹ *Santa Fe*, 530 U.S. at 313 (explaining that nothing in Constitution prevents students from voluntarily praying at school, "[b]ut the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer").

⁹⁰ Letter from Rebecca S. Markert, Staff Attorney, Freedom From Religion Found., to Terri Jordan, Interim Superintendent, El Paso Independent School District (Jan. 5, 2012), available at <http://ffrf.org/uploads/legal/BowieHigh-El%20Paso,Texas.pdf>.

⁹¹ Aaron Bracamontes, *EPISD addresses concern over prayer by Bowie High School football team*, EL PASO TIMES, Feb. 4, 2012, http://www.elpasotimes.com/ci_19886769.

⁹² Press release, Freedom From Religion Found., *FFRF ends illegal Texas football prayer* (Feb. 2, 2012), <http://ffrf.org/legal/challenges/ffrf-ends-illegal-texas-football-prayer-feb-2-2012/>.

⁹³ Press Release, Freedom From Religion Found., *FFRF ends prayer at Texas award ceremony* (June 2, 2011), available at <http://www.ffrf.org/legal/challenges/ffrf-ends-prayer-at-texas-school-award-ceremony-june-2-2011/>.

⁹⁴ Letter from Stephanie A. Schmitt, Staff Attorney, Freedom From Religion Found., to Xavier De La Torre, Superintendent, Socorro Independent School District (July 20, 2011), available at <http://ffrf.org/uploads/legal/Socorro%20Ind%20School%20Dist%20-%20EI%20Paso%20TX.pdf>.

⁹⁵ Press release, Freedom From Religion Found., *FFRF gets prayerful teacher to resign in Texas* (Aug. 9, 2011), available at <http://www.ffrf.org/legal/challenges/ffrf-gets-prayerful-teacher-to-resign-in-texas-aug-9-2011/>.

⁹⁶ Am. Civil Liberties Union of Tex. intake files.

- ◆ Humble ISD. In 2010, a mother upset by prayer at her daughter’s swim team practices and banquets complained to the district and was able to get the practice stopped.⁹⁷ But when one of the swim team coaches “apologized” for the prayer in an e-mail addressed to all parents, the complaining parent’s identity was quickly uncovered—subjecting her and her family to relentless hostility and harassment.⁹⁸
- ◆ Hondo ISD. In 2009, a first grader reported to her mother that her teacher directed her classmates in prayer every morning. After the Freedom From Religion Foundation contacted the school, the teacher, who had been with the district for 26 years and never been reprimanded, was instructed to discontinue the practice.⁹⁹
- ◆ Celina ISD: A 2008 article in the Herald Democrat revealed a long, proud history of blatant religiosity in the Celina High School Bobcats football program.¹⁰⁰ Prayer had been a “hallmark” of the school’s coaching strategy for over four decades, dating back to a former head coach who deliberately flouted the Constitution and the federal courts by praying over the loudspeaker at a game in 1999, after the Fifth Circuit had ruled the practice unconstitutional.¹⁰¹ Even in 2008, coaches continued to lead the team in prayer before and after each practice and before team meals, a fact known to and endorsed by at least one member of the Celina school board.¹⁰²

b. School-Sponsored Student Prayer at School Events

The question whether school-sponsored, school-endorsed prayer at school events violates the Establishment Clause was the central issue in *Santa Fe v. Doe*. Given the amount of public attention that case received, it is hard to believe that any public school officials in Texas could possibly remain ignorant of the Supreme Court’s holding that school-sponsored prayer at school events like football games and graduations violates the Constitution, even when a majority of students vote in favor of the practice.¹⁰³ Nonetheless, our review indicates that balloting, and a number of associated practices regarding school-endorsed prayer, persist in Texas public schools.

⁹⁷ Am. Civil Liberties Union of Tex. intake files.

⁹⁸ Am. Civil Liberties Union of Tex. intake files.

⁹⁹ Press Release, Freedom From Religion Found., *Texas Complaint Stops Prayer-Pushing Teacher* (Dec. 2009), available at <http://www.ffrf.org/publications/freethought-today/articles/texas-complaint-stops-prayer-pushing-teacher/>.

¹⁰⁰ Bill Spinks, *Holy steamrollers: Celina’s football program uses faith as cornerstone*, HERALD DEMOCRAT, Dec. 17, 2008.

¹⁰¹ Robert W. Lee, *Celina Coach: Making a Difference*, THE NEW AMERICAN, Dec. 17, 2011.

¹⁰² Spinks, *supra* note 100.

¹⁰³ The Fifth Circuit’s decision in *Jones v. Clear Creek Independent School District*, 977 F.2d 963, 972 (5th Cir. 1992), does not provide legal safe haven for the practice of voting on graduation prayer. As at least one court in Texas has recognized, the Supreme Court’s decision in *Santa Fe* “overruled Clear Creek to the extent Clear Creek approves a majoritarian election on religion.” *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 750 (W.D. Tex. 2007) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

i) “*Invocations*” and “*Benedictions*”

Invocations are prayers traditionally offered at the beginning of a Christian worship service, and benedictions are blessings traditionally offered at the conclusion of such a service.¹⁰⁴ Despite the sectarian origin of this practice, and the fact that most invocations and benedictions are overtly Christian and include references to “Jesus,” “Our Heavenly Father,” or “God Almighty,” many Texas public school events, including graduations and sports contests, include invocations and benedictions. As noted previously, while student-initiated prayer at school events is protected under both the Texas Religious Viewpoints Anti-Discrimination Act and the First Amendment, school-endorsed prayer is not protected—in fact, it is prohibited.

The practice of schools soliciting or encouraging students to pray at school events and commencement exercises may seem harmless. But for many students and their families, it is anything but: too often, they must choose between compromising their own cherished beliefs to participate in school events, or speaking out and facing community hostility and ridicule. Indeed, students and their families who challenge districts’ policies often find themselves, like the plaintiffs in *Santa Fe v. Doe*, subject to harassment and worse.

Our review indicates even districts with policies that supposedly prohibit these practices nonetheless engage in them. For example, policies at Magnolia High School in Magnolia ISD state that students are to be given opportunities to provide “introductory” remarks at school events, as well as “opening” and “closing” remarks at commencement exercises.¹⁰⁵ They also acknowledge that the Constitution forbids school officials from “direct[ing] the performance of a formal religious exercise” such as an invocation or a benediction.¹⁰⁶ These policies appear to follow the constitutionally suspect Religious Viewpoint Antidiscrimination Act, and therefore are far from the most protective approach schools could take. At most these policies purport to prohibit school officials from inviting or pressuring students into giving opening and closing prayers at school events, while leaving the door wide open for students to force unwanted religious messages on their peers.

But to make matters worse, as programs from past school events show, even these minimally restrictive policies are simply ignored. In response to a Public Information Act inquiry submitted by the ACLU of Texas, the district produced multiple printed programs from honors receptions and graduations in the school years between 2007 and 2010.¹⁰⁷ All featured student speakers delivering “invocations”; the graduation programs also included student speakers delivering “benedictions.”¹⁰⁸ The texts of the invocations and

¹⁰⁴ *Santa Fe*, 530 at 306-07 (noting that “invocation” is “a term that primarily describes an appeal for divine assistance”).

¹⁰⁵ Am. Civil Liberties Union of Tex. intake files.

¹⁰⁶ Am. Civil Liberties Union of Tex. intake files.

¹⁰⁷ Am. Civil Liberties Union of Tex. intake files.

¹⁰⁸ Am. Civil Liberties Union of Tex. intake files.

benedictions from the 2008, 2009, and 2010 graduation ceremonies confirm—as implied by the very titles “invocation” and “benediction”—that these were all prayers, directed to the “Lord God” or “Our Heavenly Father,” and delivered in “Jesus’ name.”¹⁰⁹ Regardless of the official policies enacted by the school and the district, there can be little doubt that a student invited to deliver an “invocation” or a “benediction” has been asked to pray—a practice forbidden under the First Amendment.

Other districts where student invocations and benedictions have recently been reported include:

- ◆ Humble ISD and Deer Park ISD: In 2011, the Freedom From Religion Foundation negotiated with Humble ISD and Deer Park ISD to stop the scheduling of religious exercises—specifically, invocations and benedictions—as part of the districts’ graduation ceremonies. Both districts agreed that their schools would be required to use the terms “opening remarks” and “closing remarks” rather than “invocation” and “benediction” in future ceremonies.¹¹⁰
- ◆ Dayton ISD: The 2008, 2009, and 2010 graduation ceremonies at Dayton High School featured student invocations and benedictions.¹¹¹ In response to a Public Information Act request by the ACLU of Texas, the school also acknowledged that “students are chosen from various clubs or organizations to say the prayer at home football games.”¹¹²
- ◆ Panhandle ISD: This district has a history of student prayer at school functions, both at the junior high and high school levels.¹¹³ Even the student reading announcements over the public address system at Panhandle High School football games was instructed to pause during the moment of silence to allow “enough time for the Lord’s Prayer.”¹¹⁴ The reference to the Lord’s Prayer was apparently removed from the pre-game announcements script following the ACLU’s request for information in 2009.¹¹⁵ Additionally, it appears that the “invocation” for the high school graduation ceremony has since been renamed the “acknowledgment.”¹¹⁶ It remains to be seen whether these cosmetic changes mean that school-sponsored prayer has actually stopped.

¹⁰⁹ Am. Civil Liberties Union of Tex. intake files.

¹¹⁰ Press release, Freedom From Religion Found., *FFRF Rids Two Schools of Graduation Prayer* (Aug. 4, 2011), available at <http://ffrf.org/legal/challenges/ffrf-rids-two-schools-of-graduation-prayer-8-4-11/>.

¹¹¹ Am. Civil Liberties Union of Tex. intake files.

¹¹² Am. Civil Liberties Union of Tex. intake files.

¹¹³ Am. Civil Liberties Union of Tex. intake files.

¹¹⁴ Am. Civil Liberties Union of Tex. intake files.

¹¹⁵ Am. Civil Liberties Union of Tex. intake files.

¹¹⁶ Am. Civil Liberties Union of Tex. intake files.

◆ ISD near Houston: In 2008 and 2009, concerned students from a high school near Houston began to question the school's history of student prayer at graduation.¹¹⁷ When one student expressed surprise that a public high school would have prayer at graduation, the principal retorted, "And there's a problem with that?" Frustrated by the school's unwillingness to address the issue, the student reached out to the ACLU of Texas.¹¹⁸ Unfortunately, the problem was more widespread than the student realized. Every day of the first three weeks of the school year, the school permitted students to use the public address system to solicit volunteers to deliver prayer at *any* school event.¹¹⁹ The sign-up sheet for interested volunteers was kept in the principal's office.¹²⁰ In theory, volunteers would be assigned to pray at school events on a rotating basis. In 2008 and 2009, however, *no students volunteered*.¹²¹ Nonetheless, both the 2008 and 2009 graduations at the school featured student prayer.¹²²

ii) Balloting

As explained above, balloting regarding prayer at school events was a central issue in *Santa Fe v. Doe*. When the case began, in 1995, the school's practice was to have an elected student chaplain deliver a prayer over the loudspeaker at every varsity football game. In an effort to alter its practices to pass constitutional muster, the school then changed its policy to provide for two elections concerning prayer at school events. The first election would decide whether "invocations" should be delivered at football games; assuming students voted in the affirmative, the second election would select the student to deliver the invocations.

The Supreme Court flatly rejected the district's election scheme: "[T]his student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. Because 'fundamental rights may not be submitted to vote[,] they depend on the outcome of no elections,' [and] the District's elections are insufficient safeguards of diverse student speech."¹²³

Despite the ruling in *Santa Fe*, schools continue to try to use balloting to get around the constitutional prohibition on prayers at school events. In 2009, the ACLU of Texas received complaints from two graduating seniors that King High School in Corpus Christi ISD had the senior class vote on whether to include an invocation and benediction in the school's upcoming graduation ceremony.¹²⁴ In June of that year, five days prior to King's scheduled graduation ceremony, the ACLU of Texas wrote the school district and formally requested

¹¹⁷ Am. Civil Liberties Union of Tex. intake files.

¹¹⁸ Am. Civil Liberties Union of Tex. intake files.

¹¹⁹ Am. Civil Liberties Union of Tex. intake files.

¹²⁰ Am. Civil Liberties Union of Tex. intake files.

¹²¹ Am. Civil Liberties Union of Tex. intake files.

¹²² Am. Civil Liberties Union of Tex. intake files.

¹²³ *Santa Fe*, 530 U.S. at 304-05 (internal citations omitted).

¹²⁴ Am. Civil Liberties Union of Tex. intake files.

that the invocation and benediction be removed from the program; that the students be advised that the election had been nullified in accordance with the First Amendment; and that King and all other district schools immediately stop holding elections on prayer.¹²⁵ The district agreed in writing to remove the invocation and benediction portions of the King graduation ceremony.¹²⁶ It replaced these items, however, with a student-led “opening” and “closing” delivered by the same students slated to give the invocation and benediction.¹²⁷ As of our most recent correspondence with the district in February 2010, student-led opening and closing remarks continued to be part of local schools’ graduation ceremonies.¹²⁸ In practice, this relabeling is likely to do little to alter long-standing tradition of school-sponsored prayer at King and other Corpus Christi schools. If students and administrators continue to operate with a shared understanding that “opening” and “closing” remarks are but prayers with a different name, the constitutional violation continues.

Other Texas school districts where balloting in support of prayer has recently been reported include:

- ◆ Cypress-Fairbanks ISD: In 2010, the ACLU of Texas began investigating this large Houston-area school district after learning that seniors at one of its high schools had been asked to vote on whether an invocation or benediction should be delivered at their graduation and, if so, which student should deliver it.¹²⁹ The graduation ballot at this school recreated the two-step majoritarian vote specifically rejected as violating the rights of the minority by the Supreme Court in *Santa Fe*. Pursuant to this plainly unconstitutional voting process, the 2010 graduation featured both an invocation and a benediction, delivered by students “selected by [the] Senior Class.”¹³⁰ Although such a vote would be unconstitutional even if the students unanimously wanted prayer at their graduation, the truth is that nearly one-fourth of the senior class voted *against* prayer at the 2010 ceremony.¹³¹

Public Information Act requests to the district revealed that at least three of Cy-Fair’s high schools held student elections on prayer for the 2011 graduation ceremonies.¹³² But even those schools that did not conduct balloting may have sponsored graduation prayer. Although 10 district high schools featured “opening remarks” and “closing remarks” in the official programs for the 2011 ceremonies, at least four continued to use the terms “invocation” and “benediction” during the ceremony

¹²⁵ Am. Civil Liberties Union of Tex. intake files.

¹²⁶ Am. Civil Liberties Union of Tex. intake files.

¹²⁷ Am. Civil Liberties Union of Tex. intake files.

¹²⁸ Am. Civil Liberties Union of Tex. intake files.

¹²⁹ Am. Civil Liberties Union of Tex. intake files.

¹³⁰ Am. Civil Liberties Union of Tex. intake files.

¹³¹ Am. Civil Liberties Union of Tex. intake files.

¹³² Am. Civil Liberties Union of Tex. intake files.

¹³³ Am. Civil Liberties Union of Tex. intake files.

itself.¹³³ The typed scripts at another school were renamed by hand from “Invocation” to “Opening Remarks” and from “Benediction Prayer” to “Closing Remarks.”¹³⁴ Regardless of the terms used in the printed programs, these circumstances raise serious questions about whether Cy-Fair students were invited to make “remarks” at the 2011 ceremonies—or asked to deliver prayer. The proof may be in the numbers. Of the 18 “opening” and “closing” remarks at the district’s 2011 commencement exercises, all but three were prayers.¹³⁵

- ◆ Round Rock ISD: In May 2007, the superintendent in Round Rock ISD—supposedly after receiving complaints about the *lack* of prayer at district high schools’ graduation ceremonies—ordered that seniors on each campus vote about whether to include prayer in the upcoming ceremonies.¹³⁶ Seniors at three of the four high schools voted to include prayer.¹³⁷ Seniors at the fourth school voted *not* to include prayer—twice, as the superintendent refused to accept the results from the first vote.¹³⁸ Pursuant to these elections, and after significant editing from school officials, students at three of the four high schools delivered prayer at their commencement exercises.¹³⁹ Several parents and a recent graduate filed suit, arguing under *Santa Fe v. Doe* that the district violated the Establishment Clause when it held the elections, edited the students’ prayers, and provided an official forum for students to pray.¹⁴⁰ The parties ultimately settled the lawsuit, and the district agreed not to hold any more votes on graduation prayer unless and until such a practice was explicitly condoned by the U.S. Supreme Court, the Fifth Circuit, or Texas law.¹⁴¹

Twenty years ago in *Lee v. Weisman*, the Supreme Court explained the problem with these kinds of practices:

The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.¹⁴²

Public school students should not have to choose between attending their own graduation ceremonies and avoiding state-sanctioned prayer. Unfortunately, too many Texas schools continue to put that choice to their students year after year.

¹³⁴ Am. Civil Liberties Union of Tex. intake files.

¹³⁵ Am. Civil Liberties Union of Tex. intake files.

¹³⁶ Complaint ¶ 24, *Does 1-6 v. Round Rock Indep. Sch. Dist.*, No. A-07-CA-708 SS (W.D. Tex. Aug. 20, 2007).

¹³⁷ *Id.* ¶ 33.

¹³⁸ *Id.* ¶¶ 34-35.

¹³⁹ *Id.* ¶¶ 38, 43.

¹⁴⁰ *Id.* ¶ 53.

¹⁴¹ Agreed Judgment ¶ 2, *Round Rock*, No. A-07-CA-708 SS (W.D. Tex. Mar. 6, 2008).

¹⁴² *Lee*, 505 U.S. at 596.

¹⁴³ In the 1983 case *Marsh v. Chambers*, the U.S. Supreme Court departed from its previously articulated Establishment Clause

Prayer at School Board Meetings

Not surprisingly, government-sponsored prayer in Texas goes beyond just student speakers. The ACLU of Texas has found that many school districts open school board meetings with an invocation by a district employee or member of the clergy. While the law governing legislative prayer is not well settled,¹⁴³ prayer at school board meetings is constitutionally problematic and school districts that engage in it are violating the First Amendment.

Courts of appeal that have addressed the question have found school board prayer unconstitutional.¹⁴⁴ The most recent court to consider this question was the Third Circuit Court of Appeals, in *Doe v. Indian River School District*. In *Doe*, the Third Circuit held that school board prayer should be analyzed under the coercion test articulated in *Lee v. Weisman*—the Supreme Court’s 1992 decision holding that a school district’s practice of inviting a rabbi to give the commencement prayer was unconstitutional.¹⁴⁵ It consequently invalidated prayer before school board meetings.¹⁴⁶

Texas school districts where prayer has been included in school board meetings include Brazosport,¹⁴⁷ Celina,¹⁴⁸ Cleburne,¹⁴⁹ Cypress Fairbanks,¹⁵⁰ Dayton,¹⁵¹ Ector County,¹⁵² Fredericksburg,¹⁵³ Irving,¹⁵⁴ Joshua,¹⁵⁵ Lufkin,¹⁵⁶ Magnolia,¹⁵⁷ Nacogdoches,¹⁵⁸ Panhandle,¹⁵⁹ Willis,¹⁶⁰ and Wylie.¹⁶¹

tests and decided that “the unique history” of legislative prayer as an “unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat” to the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983). Under *Marsh*, legislative prayer is constitutional as long as it is not exploited to proselytize or advance any particular creed, nor to disparage any particular creed. *Id.* at 794-95.

¹⁴⁴ *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 288-89 (3rd Cir. 2011) (reasoning that prayer at school board meeting had primary effect of favoring religion and fostered excessive government entanglement in religion); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 204-05 (5th Cir. 2006) (holding that sectarian Christian prayers at school board meetings violated Establishment Clause), *vacated on other grounds*, 494 F.3d 494 (5th Cir. 2007); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 386 (6th Cir. 1999) (same).

¹⁴⁵ *Indian River*, 653 F.3d at 275.

¹⁴⁶ *Id.* at 290.

¹⁴⁷ June 5, 2012, Notice of Regular Meeting of Board of Trustees, Brazosport ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50051435&fn=notice.pdf>.

¹⁴⁸ April 16, 2012, Notice of Regular Meeting of Board of Trustees, Celina ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50049945&fn=notice.pdf>.

¹⁴⁹ May 21, 2012, Notice of Regular Meeting of Board of Trustees, Cleburne ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50051240&fn=notice.pdf>.

¹⁵⁰ June 11, 2012, Agenda Summary, Board of Trustees Committee-of-the-Whole Meeting, Cypress Fairbanks ISD, *available at* <http://www.cfisd.net/aboutour/board/POSTING/2012/6-11-12%20Agenda.pdf>.

¹⁵¹ July 17, 2012, Agenda, Board of Trustees Regular Meeting, Dayton ISD, *available at* <http://dayton.tx.schoolwebpages.com/education/page/download.php?fileinfo=MjAxMjA3MTdfQWdlbmRhLnBkZjo6Oi93d3c2L3NjaG9vbHMvdHgvZGF5dG9uL2ltYWdlcy9kb2NtZ3lvNjMxZmlsZTM1MjcucGRm>.

¹⁵² May 15, 2012, Notice of Regular Meeting of Board of Trustees, Ector County ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50051676&fn=notice.pdf>.

¹⁵³ July 9, 2012, Notice of Regular Meeting of Board of Trustees, Fredericksburg ISD, *available at* <http://www.fisd.org/SchoolBoard/FISD%20School%20Board%20Documents/July%20Notice%20and%20Agenda.pdf>.

C. Elective Bible Courses

1. Legal Standards

The Bible is inarguably a critical text for any student of history, art, or literature. Its role in the development of human culture is profound—wars have been fought over its meaning, its stories are integral to the European and American literary canon, and it has inspired art from the Roman Empire to the present.

The Supreme Court has never read the First Amendment to prohibit instruction concerning the Bible and its role in history, literature, and art. To do so would deprive students of important information about the role of religion in human history. Indeed, for the same reasons, teachers can and should include information about all of the world’s various religions, for example, in an art class or a social studies class.

Public schools must be careful, however, to teach *about* the Bible, rather than teach the Bible itself. In other words, public school teachers should examine the role of the Bible in the context of secular (non-religious) subjects.¹⁶² The instruction should be objective and unbiased and should not promote or endorse any particular religion or religion generally.

The following activities are unconstitutional if they take place in a public school Bible course:

- ◆ Theological study of the Bible or other religious texts¹⁶³;
- ◆ Proselytizing or promoting a particular faith or religion in general¹⁶⁴;

¹⁶⁴ July 16, 2012, Agenda of Regular Meeting of Board of Trustees, Irving ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50056963&fn=notice.pdf>.

¹⁶⁵ John Henry, *Joshua board members defy outsider’s demand: Prayer will continue to be part of meetings*, CLEBURNE TIMES-REVIEW, Mar. 27, 2012, <http://www.cleburnetimesreview.com/local/x684075717/Joshua-board-members-defy-outsider-s-demand>.

¹⁶⁶ June 21, 2012, Notice of Regular Meeting of the Lufkin ISD Board of Trustees, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50054778&fn=notice.pdf>.

¹⁶⁷ July 16, 2012, Notice of Regular Meeting of the Board of Trustees, Magnolia ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50055668&fn=notice.pdf>.

¹⁶⁸ May 17, 2012, Notice of Regular Meeting of the Nacogdoches ISD Board of Trustees, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50051613&fn=notice.pdf>.

¹⁶⁹ June 19, 2012, Notice of Regular Meeting of the Board of Trustees, Panhandle ISD, *available at* <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50052916&fn=notice.pdf>.

¹⁶⁰ April 11, 2012, Agenda/Notice of Meeting of the Board of Trustees, Willis ISD, *available at* <http://www.willisisd.org/ourpages/board-agendas/49-2012/12Board%20Agenda%20April%2011%202012.pdf>.

¹⁶¹ June 18, 2012, Agenda, Regular Session, Wylie ISD, *available at* http://board-of-trustees.wylieisd.schoolfusion.us/modules/locker/files/get_group_file.phtml?fid=17299285&gid=2129652&sessionid=d16ebb6daee5d75b0cf7185038e0b606.

¹⁶² *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that . . . 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.”); *Roberts v. Madigan*, 921 F.2d 1047, 1055 (10th Cir. 1990).

¹⁶³ *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring); *Roberts*, 921 F.2d at 1055 (noting “difference between teaching about religion, which is acceptable, and teaching religion, which is not”) (internal quotation marks omitted).

¹⁶⁴ *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 598-99 (N.D. Miss. 1996).

- ◆ Devotional use of readings, prayers, or hymns¹⁶⁵; and
- ◆ Teaching the Bible as a source of historical fact.¹⁶⁶

In 2007, the Texas Legislature passed the **Act on Bible Electives**, which permits—but does not require—public schools to offer a stand-alone Bible course to students in grades 9-12.¹⁶⁷ The Act went into effect with the 2009-2010 school year.¹⁶⁸

Although the ACLU of Texas recognizes that a Bible course with a secular focus can be an instructive—and constitutional—addition to the public school curriculum, we are concerned that the Texas Legislature and State Board of Education have not done enough to ensure schools are complying with the First Amendment. For example, although the Act requires that Bible course teachers be specially trained to teach *about* the Bible, rather than teach the Bible itself, the Legislature failed to appropriate funding for a training program.¹⁶⁹ Likewise, rather than developing curriculum standards to guide teachers in teaching the Bible course, as statutorily required, the State Board of Education simply referred schools to pre-existing standards already in place for independent study in English and social studies.¹⁷⁰ No new standards geared specifically to Bible courses were created, leaving schools and educators to fend for themselves in choosing curriculum and designing courses that meet constitutional standards.

2. Texas ISDs Teaching Bible Courses

The ACLU of Texas is conducting an ongoing investigation into whether Bible courses offered in Texas public schools comply with the requirements of the First Amendment and the Act on Bible Electives. The Texas Freedom Network (TFN) published a comprehensive state-wide survey in 2006, entitled *Reading, Writing & Religion: Teaching the Bible in Texas Public Schools*.¹⁷¹ Of the over 1,000 school districts TFN surveyed, 25 had offered Bible courses in the 2005-2006 school year. Only **three** of these districts were found to have successfully created objective, nonsectarian courses appropriate for the public school setting.¹⁷²

¹⁶⁵ *Schempp*, 374 U.S. at 223; *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962); *Meltzer v. Bd. of Pub. Instruction of Orange County, Fla.*, 577 F.2d 311, 321 (5th Cir. 1978); *Crockett v. Sorenson*, 568 F. Supp. 1422, 1430 (D.Va. 1983) (noting use of hymns and prayer as evidence of Bible course's unconstitutionally religious nature).

¹⁶⁶ *Herdahl*, 933 F. Supp. at 582, 600; *Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426, 1434 (M.D. Fla. 1998).

¹⁶⁷ TEX. EDUC. CODE § 28.011.

¹⁶⁸ 2007 Tex. Sess. Law. Serv. Ch. 856 (H.B. 1287).

¹⁶⁹ TEX. EDUC. CODE § 28.011(f); *id.* § 21.459; Joy Baskin, *Before Bible Class Begins: Debate Over Bible Curriculum in Public Schools Shines Spotlight on Texas*, TEXAS LONE STAR, Mar. 2008, http://www.tasb.org/services/legal/esource/instruction/documents/rel_bibcurr.tx.pdf.

¹⁷⁰ 19 TEX. ADMIN. CODE § 74.36(d)-(e).

¹⁷¹ MARK A. CHANCEY, TEX. FREEDOM NETWORK, *READING, WRITING & RELIGION: TEACHING THE BIBLE IN TEXAS PUBLIC SCHOOLS* (2006) [hereinafter *TEACHING THE BIBLE*], available at http://www.tfn.org/site/DocServer/TX_Bible_Report_UPDATE_DEC-06.pdf?docID=167.

¹⁷² *Id.* at 43.

Alarmed by the conclusions of the TFN study, the ACLU sent open records requests to the 25 school districts identified in TFN’s report, as well as 19 others. We learned that at least 22 districts across Texas taught elective Bible courses in the 2009-2010 or 2010-2011 school year.¹⁷³

- ◆ Seven districts used a curriculum developed by the Bible Literacy Project.¹⁷⁴ Although this curriculum has caused controversy among Protestant evangelicals who believe that it distorts the Bible and undermines religious belief,¹⁷⁵ an early version was commended by TFN for its lack of a “sectarian agenda.”¹⁷⁶
- ◆ Two districts, Lubbock ISD and Willis ISD, used the curriculum of the National Council on Bible Curriculum in Public Schools (NCBCPS)¹⁷⁷—a curriculum denounced by TFN as “inappropriately and unconstitutionally promot[ing] the group’s religious beliefs”—specifically, fundamentalist Protestantism.¹⁷⁸ In 2007, the ACLU project on Freedom of Religion and Belief, the ACLU of Texas, People for the American Way Foundation, and Jenner & Block LLP sued Ector County ISD in Odessa over its NCBCPS Bible course [see case study below].¹⁷⁹ The case settled before trial, when the district agreed to abandon the NCBCPS curriculum.
- ◆ The remaining 13 districts used their own locally developed curriculum, or a commercial curriculum other than the Bible Literacy Project or NCBCPS.¹⁸¹

Case Study: Challenging a Bible Course

The National Council of Bible Curricula in Public Schools (NCBCPS) is a private organization, based in Greensboro, North Carolina, that markets a curriculum entitled “The Bible in History and Literature” for which the only textbook is the King James Bible. According to the NCBCPS website, “[t]here has been a great social regression since the Bible was removed from our schools. We need to refer to the original documents that inspired Americanism and our religious heritage.”¹⁸² Although

¹⁷³ Am. Civil Liberties Union of Tex. intake files; Joe Gulick, *Bible Classes set for three Lubbock high schools*, LUBBOCK AVALANCHE-J., May 21, 2010.

¹⁷⁴ Am. Civil Liberties Union of Tex. intake files.

¹⁷⁵ Scott Beason, *The Deception of the Bible Literacy Project*, WORLD NET DAILY, Apr. 10, 2008, <http://www.wnd.com/2008/04/612229/>; Dennis L. Cuddy, *Why is the Bible Literacy Project Controversial*, CHRISTIAN NEWSWIRE, <http://www.christiannewswire.com/news/709281939.html>.

¹⁷⁶ TEACHING THE BIBLE, *supra* note 171, at 43.

¹⁷⁷ Joe Gulick, *Bible Classes set for three Lubbock high schools*, LUBBOCK AVALANCHE-J., May 21, 2010; Am. Civil Liberties Union of Tex. intake files.

¹⁷⁸ TEACHING THE BIBLE, *supra* note 171, at 1.

¹⁷⁹ Press release, Am. Civil Liberties Union, *ACLU Successfully Helps Parents Challenge Bible Classes in Texas Public Schools* (May 16, 2007), available at <http://www.aclu.org/religion-belief/Bible-public-schools>.

¹⁸⁰ *Id.*

¹⁸¹ Am. Civil Liberties Union of Tex. intake files.

¹⁸² <http://www.Bibleinschools.net/>.

NCBCPS claims that its course material has never been successfully legally challenged,¹⁸³ a Florida judge prohibited the teaching of its New Testament material in 1998.¹⁸⁴

NCBCPS representatives began pitching the NCBCPS curriculum to Ector County Independent School District (ECISD) officials in early 2005. The superintendent commissioned a “Bible Curriculum Committee” to select a curriculum for the school district. Although the Committee endorsed the Bible Literacy Project curriculum, the superintendent overruled the Committee and submitted only the NCBCPS curriculum for the school board to approve. After citizen testimony, including an admonition that “[o]ur country is going to the devil because we don’t have God in our schools,” the ECISD school board voted 4-2 to adopt the NCBCPS curriculum.¹⁸⁵

The NCBCPS curriculum has been criticized by Biblical scholars, theologians, and constitutional experts for four major reasons.

First, the NCBCPS curriculum presents the Bible from the perspective of Christianity generally and Protestant Christianity specifically.¹⁸⁶ Examples include statements of “fact” such as:

- ◆ “The Scriptures of the New Testament show how God’s Old Covenant is fulfilled in Jesus Christ”; and,
- ◆ The “significance” of the Gospel of Matthew is that “it clearly establishes that Jesus Christ is the Messiah that was prophesized [sic] throughout the Old Testament [and] it proves that Jesus was the Son of God, whom He claimed to be through living a sinless and perfect life.”¹⁸⁷

Second, the curriculum teaches the events described in the Bible, such as the creation, the life of Noah and his ark, and the lives of Abraham, Sarah, Joseph and Moses as the literal, historical truth. For example, an NCBCPS curriculum test included true/false questions such as: “Jesus was resurrected on a Sunday”; “During his prayer, Jesus sweated drops of blood”; and “When Jesus dies, the sun goes black.”¹⁸⁸

Third, the NCBCPS curriculum uses the Bible to inculcate religious life lessons. For example, students are tested on their understanding of Proverbs with the question: “If you keep all the Lord’s teachings in your heart, what will happen with your life?” Students are required to memorize Psalms, and then spend time in small group discussion identifying how the Psalms may “affect their individual daily lives.”¹⁸⁹

¹⁸³ http://www.Bibleinschools.net/images/pdf/ncbcps_brochure.pdf (last visited Feb. 9, 2012).

¹⁸⁴ *Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426, 1434-35 (M.D. Fla. 1998).

¹⁸⁵ Complaint ¶ 26, *Moreno v. Ector County Indep. Sch. Dist.*, No. 07-CV-039 (W.D. Tex. May 16, 2007).

¹⁸⁶ See MARK A. CHANCEY, TEX. FREEDOM NETWORK ED. FUND, THE BIBLE AND PUBLIC SCHOOLS: REPORT ON THE NATIONAL COUNCIL ON BIBLE CURRICULUM IN PUBLIC SCHOOL 8-9 (2005), available at <http://www.tfn.org/site/DocServer/BibleCurriculum2.pdf?docID=125>.

¹⁸⁷ Complaint ¶¶ 31-32, *Moreno*, No. 07-CV-039 (W.D. Tex. May 16, 2007).

¹⁸⁸ *Id.* ¶ 35.

¹⁸⁹ *Id.* ¶ 38.

Finally, the NCBCPS curriculum presents a religious interpretation of American history that does not comport with objective scholarly standards. For example, the course uses resources from WallBuilders, an organization whose self-described mission includes “educating the nation concerning the Godly foundation of our country.”¹⁹⁰

On May 16, 2007, the ACLU and the ACLU of Texas, along with People for the American Way, filed a lawsuit on behalf of seven parents challenging the ECISD’s use of the NCBCPS curriculum. The lawsuit was settled March 8, 2008, when the ECISD agreed that it would never teach the NCBCPS curriculum in its public schools again.

Unfortunately, a number of other districts in Texas are reportedly continuing to use this curriculum despite its significant constitutional flaws.

3. Analysis of a Locally Developed Bible Course

The ACLU conducted an in-depth analysis of several of the “home-grown” Bible curricula taught in Texas public school districts to determine whether they complied with Texas law and the First Amendment. Unfortunately, a number of these courses have serious constitutional flaws.

In this section, we use examples from one of these locally developed courses to illustrate the most common flaws we have encountered across the state.

One suburban school district offered a two-semester Bible Studies course, covering both the Old and New Testaments.¹⁹¹ The course is billed as “giv[ing] students an opportunity to study both the literary and historical aspects of the Bible.”¹⁹² Course materials do not live up to this description, however. Instead, they show that students are being offered an in-depth Bible study—appropriate for a church setting, but not for a secular school.

Like many other home-grown courses, this course uses the Bible as a primary text.¹⁹³ This means that learning units are organized around specific books of the Bible,¹⁹⁴ and coursework consists almost exclusively of reading and interpreting the Bible.¹⁹⁵ Such methodical, systematic study of the Bible has been struck down by courts in the past.¹⁹⁶

¹⁹⁰ *Id.* ¶ 41.

¹⁹¹ Am. Civil Liberties Union of Tex. intake files.

¹⁹² Am. Civil Liberties Union of Tex. intake files.

¹⁹³ Am. Civil Liberties Union of Tex. intake files.

¹⁹⁴ Am. Civil Liberties Union of Tex. intake files.

¹⁹⁵ Am. Civil Liberties Union of Tex. intake files.

¹⁹⁶ *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 594-95 (N.D. Miss. 1996).

To track their “progress” in the course, students are asked to memorize weekly verses, the Ten Commandments, Psalms and Proverbs, and the division and books of the Old and New Testaments, with no apparent secular justification for these endeavors.¹⁹⁷ Courts have easily identified these kinds of exercises as patently religious.¹⁹⁸

The course also treats events in the Bible as literal and historical truth. For example, one overview document for the Old Testament course states that students will be taught to “[i]dentify the locations [of Biblical events] from ancient maps showing the overlapping areas of Biblical and secular regions of history.”¹⁹⁹ Similarly, unit tests through the course contain “True/False” questions of “fact,” such as “[t]here were forty days of recorded appearances between Christ’s resurrection and his ascension.”²⁰⁰ The Establishment Clause prevents schools from treating the Bible as a source of historical fact.²⁰¹

Finally, the course features the use of highly sectarian secondary materials. For example:

- ◆ *Halley’s Bible Handbook*: This book has been criticized by TFN for its sectarian bias and for conveying the strict belief in the Bible as literal truth.²⁰² *Halley’s* claims that “the Bible is God’s word” and that “[t]he Bible was written only that men might Believe, and Understand, and Know, and Love, and Follow CHRIST.”²⁰³ These are hardly appropriate sentiments for a public school setting in which officials and instructors are required to maintain neutrality toward religion.²⁰⁴ Nonetheless, daily lesson plans provided by the school district show regular reading assignments from *Halley’s*,²⁰⁵ and many written exams contain questions based on this book.²⁰⁶
- ◆ Videos about inherently sectarian biblical concepts: Videos used in the course feature themes—such as the resurrection of Christ and God’s punishment of sin²⁰⁷—that many courts have found impossible to teach for secular purposes.²⁰⁸ Another video included in the course materials straightforwardly acknowledges that it is intended to “transport” young viewers “to Bible times where they learn of a loving God who cares for His people through all the ages.”²⁰⁹ These young viewers are then able to

¹⁹⁷ Am. Civil Liberties Union of Tex. intake files.

¹⁹⁸ *Doe v. Porter*, 188 F. Supp. 2d 904, 912 (E.D. Tenn. 2002).

¹⁹⁹ Am. Civil Liberties Union of Tex. intake files.

²⁰⁰ Am. Civil Liberties Union of Tex. intake files.

²⁰¹ *Herdahl*, 933 F. Supp. at 600; *Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426, 1434 (M.D. Fla. 1998).

²⁰² See TEACHING THE BIBLE, *supra* note 171, at 19-20.

²⁰³ Henry M. Halley, *Halley’s Bible Handbook: An Abbreviated Bible Commentary* 20, 22 (Zondervan Publishing House 1965) (1924).

²⁰⁴ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (holding that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”).

²⁰⁵ Am. Civil Liberties Union of Tex. intake files.

²⁰⁶ Am. Civil Liberties Union of Tex. intake files.

²⁰⁷ Am. Civil Liberties Union of Tex. intake files.

²⁰⁸ *Gibson v. Lee County Sch. Bd.*, 1 F. Supp. 2d 1426, 1434 (M.D. Fla. 1998); *Wiley v. Franklin*, 474 F. Supp. 525, 531 (E.D. Tenn. 1979).

²⁰⁹ Am. Civil Liberties Union of Tex. intake files.

“apply the faith-building lessons to their lives.”²¹⁰ Courts have been critical of other courses involving the “application of Bible to daily life,” described as “a pastoral or religious task in itself.”²¹¹

The Texas Act on Bible Electives envisions that public schools in Texas will offer Bible courses that “maintain[] religious neutrality and accommodat[e] the diverse religious views, traditions, and perspectives of students in their school district.”²¹² The Supreme Court has also stated that a public school should be able to teach students about the Bible—in theory—without running afoul of the Establishment Clause.²¹³ Unfortunately, our analysis shows that many courses offered in Texas public schools fail to live up to the vision of the Texas Legislature and the Supreme Court.

D. Gideons Bible Distributions

1. Legal Standards

As with school prayer, the touchstone for understanding the legal limitations on the distribution of Bibles in public schools is the principle that school officials may not press their own religious views on students nor permit other adults to do so. Thus, Bibles may be distributed in public schools by outsiders only in very limited circumstances. Some courts have said that high schools can allow outside groups to distribute Bibles or other religious literature passively—such as by placing them on a table for students who want to take one—under strict limits and as long as all other groups that want to distribute outside materials have the same access.²¹⁴ Schools may not permit distributions, however, that are done in a way intended to advance religion, that appear to favor a religious view, or that create an environment in which students feel coerced to take the material.²¹⁵ For example, schools may not allow outside religious groups to come in and proselytize to students or hand out religious materials during class time.²¹⁶

Different rules may apply in the case of younger school age children. At least one court has found that Bibles and other religious scriptures should not be distributed to elementary aged students by outside groups at any time during school because younger students may not understand that it is not the school endorsing the religious text.²¹⁷

²¹⁰ *Id.*

²¹¹ *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 596 (N.D. Miss. 1996).

²¹² TEX. EDUC. CODE § 28.011(d).

²¹³ *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that [literary and historic] 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.”).

²¹⁴ *Peck v. Upshur*, 155 F.3d 274, 288 (4th Cir. 1998).

²¹⁵ *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593-94 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

²¹⁶ *Doe v. South Iron R-1 Sch. Dist.*, 498 F.3d 878, 883 (8th Cir. 2007); *Berger v. Renseelaer Cent. Sch. Corp.*, 982 F.2d 1160, 1171 (7th Cir. 1993); *Chandler v. James*, 985 F. Supp. 1094, 1101 (N.D. Ala. 1997); *Goodwin v. Cross County Sch. Dist. No. 7*, 394 F. Supp. 417, 427-28 (E.D. Ark. 1973).

²¹⁷ *Peck*, 155 F.3d at 288-89.

2. Reported Violations

The Gideons describe themselves as “an interdenominational association of Christian business and professional men who are members of Protestant/evangelical churches.”²¹⁸ Their mission is to “sav[e] the lost through personal witnessing” and to “distribut[e] . . . God’s Word.”²¹⁹ They operate in 190 countries, primarily through local-area Gideons who know key locations where Bibles may be distributed including, notably, schools.²²⁰ Although Gideons passively distribute Bibles in some locations, such as hotels and prisons, they prefer to rely on person-to-person contact in a school setting.²²¹ “Students in fifth grade or above” are a primary demographic for their work.²²²

In 2009, the ACLU of Texas issued a report entitled *Distribution of Gideons Bibles in Texas Public Schools: Impact on Students’ Religious Liberty*, which analyzed the impact that distribution of Gideons Bibles in multiple Texas school districts had on students, parents, and teachers.²²³ The report reached disturbing conclusions:

- ◆ Several school districts failed to enforce district policy regarding the distribution of outside material during the Gideons’ visits, resulting in violations of students’ religious liberty.
- ◆ Permitting the Gideons to distribute Bibles in public schools without properly enforced guidelines caused disruptions in the educational environment.
- ◆ The distributions resulted in serious harassment of religious minorities.

The ACLU of Texas continues to receive complaints from students and their parents about the presence of the Gideons and their distribution practices on Texas public school campuses. For instance, at Mike Moses Middle School in Nacogdoches ISD, the school principal announced the presence of the Gideons during students’ lunch hour and encouraged students, table by table, to approach the Gideons in order to receive a Bible.²²⁴ At least one of the students in attendance did not want a Bible but felt compelled under the circumstances to accept one.²²⁵

²¹⁸ Gideons International, *About Us: A Lasting Mission*, at <http://www.gideons.org/AboutUs/LastingMission.aspx> (last visited Feb. 2, 2012).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Gideons International, *About Us: A Unique Focus*, at <http://www.gideons.org/AboutUs/LastingMission.aspx> (last visited Feb. 2, 2012).

²²² *Id.*

²²³ FLEMING TERRELL, AM. CIVIL LIBERTIES UNION FOUND. OF TEX., *DISTRIBUTION OF GIDEONS BIBLES IN TEXAS PUBLIC SCHOOLS: IMPACT ON STUDENTS’ RELIGIOUS LIBERTY* (Oct. 8, 2009), available at <http://www.aclutx.org/reports/2009Gideons.pdf>.

²²⁴ Am. Civil Liberties Union of Tex. intake files.

²²⁵ Am. Civil Liberties Union of Tex. intake files.

Other recent examples include:

- ◆ At Uttley Middle School in Rockwall ISD, Gideon Bibles were set up on a table in the school library, under a sign reading “Free Bibles.”²²⁶ While the Gideons were not allowed to interact with students, the school failed to post a sign on the table disclaiming school sponsorship of the materials as required by district policy.²²⁷ Moreover, according to one report, the school librarian proactively encouraged students in the library to “feel free” to take a Bible.²²⁸ The school district denies this allegation, but one thing is absolutely clear: just as at Moses Middle School, a child in attendance felt pressured to take a Gideon Bible despite not wanting one.²³⁰
- ◆ A former teacher at Navasota Junior High in Navasota ISD reported that her students received Bibles from an outside group in the school cafeteria during lunch. When she instructed the students to put them away, as she would tell them to put away any reading material not related to the day’s instruction, she was later accused by an irate parent of being “anti-Christian.”²³¹
- ◆ In November 2011, the middle school in Liberty-Eylau ISD permitted the Gideons to distribute Bibles to fifth graders during their lunch period. In response to a letter from the Freedom From Religion Foundation, the district claimed that such “unauthorized” distributions had stopped.²³²

As set forth in detail in the ACLU of Texas’s 2009 report, failure to limit the manner in which Gideons and their Bibles are allowed on campus can lead to disruption, religious coercion, and harassment. The incidents at Nacogdoches, Rockwall, Navasota, and Liberty-Eylau ISDs are further evidence that school officials must be vigilant in shielding students from outside pressure and maintaining an appropriate learning environment.

E. Religious Displays and Observances in Public School

1. Legal Standards

Whether a religious display on public property is constitutional usually depends very much on the specific characteristics of the display, as well as its context. Courts generally ask whether the display conveys an endorsement or disapproval of religion.²³³ As U.S. Supreme Court Justice Sandra Day O’Connor wrote in the case of *Lynch v. Donnelly*, the

²²⁶ Am. Civil Liberties Union of Tex. intake files.

²²⁷ Am. Civil Liberties Union of Tex. intake files.

²²⁸ Am. Civil Liberties Union of Tex. intake files.

²²⁹ Am. Civil Liberties Union of Tex. intake files.

²³⁰ Am. Civil Liberties Union of Tex. intake files.

²³¹ Am. Civil Liberties Union of Tex. intake files.

²³² Press Release, Freedom From Religion Found., *Gideons kicked off Texas campus* (Nov. 22, 2011), available at <http://ffrf.org/legal/challenges/gideons-kicked-off-texas-campus-nov-22-2011/>.

²³³ *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 595-97 (1989).

relevant question is whether the display “sends a message to nonadherents that they are outsiders . . . and an accompanying message to adherents that they are insiders.”²³⁴ Using this test, the Supreme Court has reached different conclusions about whether a particular display of religious imagery violates the Establishment Clause.²³⁵

But the rules are much stricter when it comes to the public school context: religious displays are not allowed unless there is a clear educational purpose. Thus, even displays that might be permissible at a courthouse or in the public square may be off limits at school.²³⁶ The Court’s increased sensitivity in the public school setting is driven by concern about primary and secondary school-age children’s particular susceptibility to subtle coercive pressures, as well as the fact that students are compelled by law to attend.²³⁷

2. Reported Violations

The problem of religious imagery in Texas public schools is widespread and endemic. The ACLU of Texas receives numerous reports every year of crosses hung in classrooms and school hallways. One former teacher in the Navasota ISD reported religious icons and prayers displayed in most of the junior high’s classrooms.²³⁸ We have also heard of schools hanging posters with religious messages in plain view of students. For example, the boys’ bathrooms in at least one Fredericksburg ISD school apparently had signs warning, “God might be watching you.”²³⁹ And in Cleburne ISD, a banner hung in the school gym read, “In God We Trust.”²⁴⁰ When the ACLU inquired into the origin of this sign, one district representative emailed another with the message:

The ACLU can take that banner down over my dead body. Until then, leave it up.²⁴¹

These displays raise serious First Amendment concerns. They are visible, semi-permanent, physical reminders to students that their school administrators and teachers have endorsed religion or a particular religious viewpoint. They “send[] a message to nonadherents that they are outsiders . . . and an accompanying message to adherents

²³⁴ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

²³⁵ See, e.g., *Allegheny*, 492 U.S. at 598-602, 613-21 (concluding that nativity scene at county courthouse sent “patently Christian message” while Christmas tree and menorah were part of a scene that was overall secular).

²³⁶ Compare *Van Orden v. Perry*, 545 U.S. 677, 690-92 (2005) (deciding that installation of Ten Commandments on state capital not an Establishment Clause violation) with *Stone v. Graham*, 449 U.S. 39, 42 (1980) (finding that mandatory posting of Ten Commandments on a school wall was unconstitutional).

²³⁷ *Van Orden*, 545 U.S. at 690-91 (noting that Establishment Clause must be applied with special sensitivity in the public-school context); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (warning that the Establishment Clause must be applied with special sensitivity in the public-school context).

²³⁸ Am. Civil Liberties Union of Tex. intake files.

²³⁹ Am. Civil Liberties Union of Tex. intake files.

²⁴⁰ Am. Civil Liberties Union of Tex. intake files.

²⁴¹ Am. Civil Liberties Union of Tex. intake files.

that they are insiders.”²⁴² For students, especially those in elementary and middle school, the coercive effects of being confronted on a daily basis by religious imagery or messages cannot be denied.²⁴³

F. Graduation and School Events Held in Churches

1. Legal Standards

Public schools may not hold school events in churches or houses of worship unless exceptional circumstances require it.²⁴⁴ The Supreme Court has not yet addressed holding a school event at a religious location. But lower courts have found that using religious facilities such as churches or synagogues—which are normally decorated with overtly religious icons and symbols, such as crosses, crucifixes, menorahs, or the like—conveys the message that the school endorses religion.²⁴⁵ Public schools must, therefore, exhaust secular alternatives as genuinely not viable before holding a school function in a religious setting.²⁴⁶

2. Problematic Practices

Texas schools may hold functions off-site for a number of reasons—to accommodate a larger crowd than the school facilities can hold, for example, or to take advantage of a facility’s superior sound or video capabilities. But when a Texas school decides to use a religious setting such as a church or synagogue for a school event, it must be careful to avoid endorsing or becoming entangled with the religious group providing the facility. From complaints received by the ACLU of Texas, it appears that too many Texas school districts fail to police adequately the use of religious buildings for school events. As a result, some school districts use church facilities as a matter of tradition or habit, without any consideration of secular alternatives—a troubling situation under the First Amendment:

- ◆ Lufkin ISD. Records from Lufkin ISD revealed a common practice of using local churches for school functions.²⁴⁷ The most frequently used church was First United Methodist, which also happens to be across the street from Lufkin Middle School.²⁴⁸ During the 2007-2010 school years, this church hosted at least nine separate events for area schools, including special education graduations for the high

²⁴² *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

²⁴³ *Stone v. Graham*, 449 U.S. 39, 42 (1980); see also *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (“[S]ymbolism of a union between church and state is most likely to influence children of tender years.”).

²⁴⁴ See *Doe ex rel Doe v. Elmbrook Sch. Dist.*, ___F.3d ___ 2012, WL 2996743 (7th Cir. 2012) (en banc); *Does v. Enfield Public Schools*, 716 F. Supp. 2d 172 (D. Conn. 2010).

²⁴⁵ *Does v. Enfield*, 716 F. Supp. 2d at 191-92 (declaring that holding high school graduation at church “overwrought with religious symbols” sent message that school board endorsed religion).

²⁴⁶ *Id.* at 192-95 (concluding that school board’s failure fully to consider alternatives to church venue for graduation, along with religious group’s lobbying to the board to “protect religious freedom” by selecting church, sent message that school board endorsed religion).

²⁴⁷ Am. Civil Liberties Union of Tex. intake files.

²⁴⁸ <http://lufkinfirst.com/map-directions/> (describing location as “Across from Lufkin Middle School”) (last visited Feb. 8, 2012).

school; a National Honor Society induction ceremony; Senior Breakfasts; a “fun day” for an academic team at the middle school; and a teacher in-service day.²⁴⁹ The district also used two local Baptist churches for professional development courses for its employees in 2008 and 2009.²⁵⁰

In May 2011, the ACLU of Texas wrote to Lufkin’s Superintendent, recommending that the district adopt a policy for ensuring that off-site events are held at locations that would not alienate students and teachers of non-Christian faiths.²⁵¹ Several days later, the superintendent was quoted by local news as stating that all school ceremonies previously held at churches would be moved to the recently completed auditorium at the high school.²⁵² Although the ACLU of Texas applauds this announcement, we received another complaint that very same day that First United Methodist was the venue for a school district event: this time, a party for Lufkin Middle School students.²⁵³

- ◆ Irving ISD. In 2004, Irving ISD began holding graduation ceremonies for its four high schools at the Potter’s House, a nondenominational “megachurch” in Dallas led by Bishop T.D. Jakes.²⁵⁴ Irving has used this venue for graduation year after year, at great financial and personal cost to district residents and students. Records received by the ACLU of Texas show that the district paid over \$60,000 in 2010 to rent the church facilities for graduation.²⁵⁵ They also show that at least one student missed out on graduation with his family because they were unwilling to attend a ceremony at Potter’s House.²⁵⁶ Although the district announced in May 2011 that the 2011 graduation ceremonies would be the last held at the church,²⁵⁷ it appears that the church was the site of 2012 graduation ceremonies as well.²⁵⁸
- ◆ Dallas ISD. Dallas ISD has a policy that requires the superintendent to approve the use of religious facilities for commencement exercises, but only if the district provides written documentation of “reasonable efforts” to find a non-religious venue.²⁵⁹

²⁴⁹ Am. Civil Liberties Union of Tex. intake files.

²⁵⁰ Am. Civil Liberties Union of Tex. intake files.

²⁵¹ Letter from Lisa Graybill, Legal Director, Am. Civil Liberties Union Found. of Tex., to Roy Knight, Superintendent, Lufkin Independent School District (May 18, 2011), *available at* <http://www.aclutx.org/2011/05/18/aclu-of-texas-urges-lufkin-isd-to-change-venues-for-school-sponsored-events/>.

²⁵² Melissa Crager, *ACLU sends letter to Lufkin ISD questioning constitutionality of school functions at church*, THE LUFKIN NEWS, May 18, 2011, http://lufkindailynews.com/news/local/article_18bcd0da-81bc-11e0-bd32-001cc4c002e0.html.

²⁵³ Am. Civil Liberties Union of Tex. intake files.

²⁵⁴ *Irving ISD to stop using church for graduation*, WFAA.COM, May 16, 2011, <http://www.wfaa.com/news/education/121883694.html>.

²⁵⁵ Am. Civil Liberties Union of Tex. intake files.

²⁵⁶ Am. Civil Liberties Union of Tex. intake files.

²⁵⁷ *Irving ISD to stop using church for graduation*, *supra* note 254.

²⁵⁸ <http://irvingisd.net/education/components/scrapbook/default.php?sectiondetailid=22061> (last visited June 21, 2012).

In January 2012, the district board of trustees was set to consider rescinding the policy, but ultimately pulled the issue from the agenda—leaving the existing policy intact.²⁶⁰ This was the right decision—allowing the district flexibility to use a religious facility if necessary, but requiring oversight and clear deliberation first. Unfortunately, having a good policy on paper does not ensure that the policy is followed in practice. In May 2012, a district high school used a local church for graduation after receiving a “waiver” of the policy from the school board.²⁶¹ District employees admitted to the board that alternative, non-sectarian locations were available, but the school simply preferred to use the church.²⁶²

As these examples demonstrate, holding graduation ceremonies in a religious setting can alienate some students, family, and faculty.

G. Other Examples of Religious Entanglement

Although the problems discussed above are the most common scenarios encountered by the ACLU of Texas, the Establishment Clause is potentially implicated any time religion is injected into the public school environment. Below are some other recent examples of religious entanglement in Texas public schools:

- ◆ **A religious film screened to students during class time.** At Trinity High School in Hurst-Eules-Bedford ISD, a teacher showed the film “Fireproof” to several classes. “Fireproof” chronicles the life of a Christian man who is forced to save his marriage by showing his wife the love of Christ. Following a letter from the Freedom From Religion Foundation, the district superintendent directed the teacher not to show the movie again.²⁶³
- ◆ **A field trip to see a religious play at a local church.** For the past few years, Ysleta ISD has bussed students and teachers to a “Christmas giveaway” at a local church—costing the district approximately \$6,000 in fuel costs alone.²⁶⁴ The event typically happens during a school day in December and features a play with overtly

²⁵⁹ Press Release, Am. Civil Liberties Union of Tex., *ACLU of Texas Questions Change in DISD Neutrality Policy on Graduation Venues* (Jan. 12, 2012), available at <http://www.aclutx.org/2012/01/12/aclu-of-texas-questions-change-in-disd-neutrality-policy-on-graduation-venues/>; see also Dallas Independent School District Board Policy FMH (LOCAL), available at [http://pol.tasb.org/Policy/Download/361?filename=FMH\(LOCAL\).pdf](http://pol.tasb.org/Policy/Download/361?filename=FMH(LOCAL).pdf).

²⁶⁰ Tawnell Hobbs, *Dallas ISD pulls agenda item allowing graduations at religious buildings*, DALLASNEWS.COM, Jan. 23, 2012, <http://dallasisdblog.dallasnews.com/archives/2012/01/dallas-isd-pulls-proposal-that.html>.

²⁶¹ Terri Burke, Letter to the Editor, *Dallas ISD wrong to hold graduation in church*, DALLAS MORNING NEWS, May 29, 2012, <http://www.dallasnews.com/opinion/latest-columns/20120529-terri-burke-dallas-isd-wrong-to-hold-graduation-in-church.ece>.

²⁶² *Id.*

²⁶³ Press Release, Freedom From Religion Found., *FFRF chides Texas school for showing overtly religious film* (Feb. 27, 2012), available at <http://ffrf.org/legal/challenges/ffrf-chides-texas-school-for-showing-overtly-religious-film-feb-27-2012>.

²⁶⁴ Marty Schladen, *School districts' trip to Abundant Living Faith Center raises legal questions*, EL PASO TIMES, Apr. 9, 2012, http://www.elpasotimes.com/news/ci_20352936.

religious messages.²⁶⁵ In 2011, for example, a character in the play implored the audience to pray that Jesus would come into their hearts.²⁶⁶

- ◆ **Proselytizing on an elementary school field trip.** In October 2011, first graders and kindergarteners at Bel Air Elementary in Athens ISD visited a pumpkin patch at a local church. Students were told that God made each pumpkin different, just like He made each child different. They were also given a pamphlet to take home, which instructed them to pray to God for forgiveness because they were all sinners. The Freedom From Religion Foundation wrote to the district, objecting to the exposure of students to proselytization while on a school trip.²⁶⁷ In response, an attorney representing the district stated that “[i]t was never the intent of the school district to convey a message or endorsement of any religious views held by the church” and “any such endorsement was done without knowledge or approval of the school district.”²⁶⁸
- ◆ **A principal lecturing high school students about Christ.** In October 2011, the principal at the high school in North Lamar ISD convened a school assembly to talk about drug abuse. During the assembly, the principal read passages and teachings from the Bible, including the statement that “Christ died for the just and the unjust.” He also allegedly implied that “people that don’t have god in their life, and people who don’t believe in something more are manufacturing and selling addictive substances.” The Freedom From Religion Foundation complained, prompting the district to make assurances that no future school assemblies would contain school-sponsored religious messages.²⁶⁹
- ◆ **A six-year-old child forced to attend Bible study on school grounds against her parents’ wishes.** During the 2010-2011 school year, an elementary school in a large metropolitan area partnered with a local non-profit to offer an after-school program at the school.²⁷⁰ The program featured several different activities, including a Bible study.²⁷¹ The child’s parents checked “no” on a permission slip for the Bible study.²⁷² Nevertheless, the child was required to attend the Bible study four different times before the school finally respected the family’s wishes.²⁷³

²⁶⁵ *Id.*

²⁶⁶ Am. Civil Liberties Union of Tex. intake files.

²⁶⁷ Press Release, Freedom From Religion Found., *FFRF protests proselytizing at Texas pumpkin patch* (Jan. 31, 2012), available at <http://www.ffrf.org/legal/challenges/ffrf-protests-proselytizing-at-texas-pumpkin-patch-jan-31-2012/>.

²⁶⁸ Letter from Blake E. Armstrong, Attorney, Birdsong and Armstrong P.C., to Stephanie Schmitt, Staff Attorney, Freedom From Religion Found. (Jan. 31, 2012), available at <http://ffrf.org/uploads/legal/Bel-AirElementaryfieldTripResponse.pdf>.

²⁶⁹ Press Release, Freedom From Religion Found., *FFRF stops proselytizing principal* (Nov. 21, 2011), available at <http://www.ffrf.org/legal/challenges/ffrf-stops-proselytizing-principal-nov-21-2011/>.

²⁷⁰ Am. Civil Liberties Union of Tex. intake files.

²⁷¹ Am. Civil Liberties Union of Tex. intake files.

²⁷² Am. Civil Liberties Union of Tex. intake files.

²⁷³ Am. Civil Liberties Union of Tex. intake files.

- ◆ **A middle school science teacher pushing creationism on her students.** A science teacher at Montwood Middle School in Socorro ISD promoted creationism in her classroom, telling students that “really God created the world” during a unit on the “big bang” scientific theory. Around the time that the district received a complaint from the Freedom From Religion Foundation, the teacher resigned.²⁷⁴

V. Conclusion and Recommendations

While there are a few success stories, the findings set forth in this report reveal a disturbing pattern in Texas schools. Public schools are required under the First Amendment to remain steadfastly neutral on the matter of religion, respecting the religious beliefs of all students and favoring none. Yet Texas students are being exposed on a regular basis to religious endorsement and messages from their teachers and school administration. In addition, religious practices of some students have been limited by uncompromising enforcement of school policies burdening religion.

For School Boards:

To safeguard the rights of students, their families, and faculty, the ACLU of Texas recommends that school boards, in cooperation with school administrators, take the following actions:

- ◆ **Set Clear Policies.** School districts should clearly articulate their policies regarding dress code exemptions for religious attire, and should make the process for requesting an exemption, including an exemption form, available to all students and their families.
- ◆ **Accommodate Religious Dress and Students’ Free Exercise of Religious Beliefs.** To ensure compliance with TRFRA, school districts should grant dress code exemptions when a student’s free exercise of his or her sincerely held religious beliefs includes religious attire, except in cases where the attire poses a danger to other students.
- ◆ **Avoid Prayer at School Events.**
 - ◇ **Eliminate School Sponsored Prayer at School Events.** Invocations, benedictions, and any other school-endorsed prayer should be removed from all school programs.

²⁷⁴ Press Release, Freedom From Religion Found., *FFRF gets prayerful teacher to resign in Texas* (Aug. 9, 2011), available at <http://www.ffrf.org/legal/challenges/ffrf-gets-prayerful-teacher-to-resign-in-texas-aug-9-2011/>.

- ❖ **Prohibit Elections on School Prayer.** Monitor local schools to ensure that they are NEVER putting student prayer to a vote. Religious liberty is not subject to the will of the majority. Any school that permits a vote on prayer has endorsed religion and opened up the district to a lawsuit.
- ❖ **Never Endorse Student-Initiated Prayer.** Include disclaimers of sponsorship of student speech at all graduation, academic, and sports events. This step will ensure that, if religious speech is spontaneously offered by a student, it will not be mistaken for school-endorsed speech.
- ◆ **Carefully Supervise Bible Courses If Offered.** Adopt strict guidelines to govern how Bible courses are taught in public schools. The instructors of these courses should receive comprehensive training on how to teach this sensitive topic with focus on the historical and literary value of the Bible. The State Board of Education could advance the cause of religious liberty by drafting clear curriculum standards for the Bible elective to guide schools and teachers on choosing a constitutionally acceptable curriculum.
- ◆ **Prohibit Distribution of Outside Religious Material Such as Gideons Bibles.** Outside groups should not be allowed on campus to distribute religious materials directly to students.
- ◆ **Prohibit Religious Imagery, Signs, and Displays Unless Educational Purpose Is Clearly Established.** Religious displays should be prohibited unless the person advocating the display can point to a legitimate pedagogical purpose. Even then, such displays should be temporary. And if there is any danger that the object would be viewed as primarily religious, it should be taken down.
- ◆ **Use Secular Locations for Graduation and Other Ceremonies.** Consider all secular alternatives before holding a school event in a religious setting. If a secular venue is available, it should be chosen over a church or place of worship in order to avoid ostracizing or offending students, family, and faculty of varying faiths.

For Parents and Students:

For parents and students who believe that their district or school has violated their religious freedom, the ACLU of Texas offers the following suggestions:

- ◆ **Know Your Rights.** Learn more about your right to freedom of religion in school by downloading our Youth Rights Manual.

- ◆ **Research Your School District's Policies.** Often called the EMI (Legal) and FMH (Legal) Policies, a school district's rules regarding religious expression and endorsement are usually available on a school board's website, or paper copies can be requested from the school office. Also review your school's Student Handbook for the procedures to report problems.
- ◆ **Monitor Conduct.** Monitor the district to ensure that school faculty and officials are in compliance with state and federal law regarding the issues discussed in this report.
- ◆ **Document Your Observations.**
 - ✧ If a particular incident or issue concerns you, *document everything about it.* Keep careful notes about what happened, when, where, who was involved, other witnesses, any and all documents, and to whom the action was targeted. This will aid any subsequent legal action.
 - ✧ Also be sure to document any harassment you witness or experience. *Note that Texas schools have a legal duty to protect students who are being harassed based on religion.*²⁷⁵ This duty is triggered when the school knows or should have known an individual is facing harassment.
- ◆ **Report Violations.** Report any incident that you believe is in violation of the law:
 - ✧ To your school district, following the harassment or violation procedures outlined in school board policy handbooks; and
 - ✧ To the ACLU of Texas, using our online, confidential complaint form at www.aclutx.org.

For Community Members and Activists:

Parents, students, and administrators shouldn't be the only ones who care about religious freedom in Texas public schools! It is everyone's responsibility to protect our constitutional rights and make sure the next generation of Texans grows up to enjoy the freedoms we have today. For interested community members:

- ◆ **Get involved.** Find out what your school district's policies and practices are and how they could be improved to better protect religious freedom. Ask candidates for school board to explain their positions on religion at school.

²⁷⁵ TEX. EDUC. CODE § 37.001(a)(7)-(8).

- ◆ **Attend a school board meeting.** School board meetings are open to the public, and concerned community members can not only observe the proceedings, but also sign up to speak to the board about the issues on the agenda. For more information about how to get involved with your local school board, see our “how to” guide, *Stand Up for Children: A Parent’s Guide to School Board Advocacy*.
- ◆ **Run for your local school board.** If none of the candidates in your community is willing to stand up for religious liberty, consider running for office yourself!
- ◆ **Write a letter to the editor of your local community newspaper.** Explain why you support the protection of students’ rights to freely exercise their faiths and be free from the establishment of religion in Texas public schools.
- ◆ **Join the ACLU of Texas’ Community Action Network** to help us advocate for religious freedom.



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