RELIGION IN SCHOOLS

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REPRESENTATIVE PUBLISHED DECISIONS

FW/PBS, Inc., v. City of Dallas, 493 U.S. 215 (1990) (upheld constitutionality of majority of municipal ordinance regulating sexually oriented businesses).
Morgan v. Swanson, No. 09-40373, 2011 U.S. App. LEXIS 19656 (5th Cir. September 27, 2011) (en banc) (granting qualified immunity on alleged violation of elementary school students' speech rights)
Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546 (5th Cir. 2006) (upheld municipal ordinance in federal civil rights case involving a First Amendment challenge).
Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402 (5th Cir. 1995) (held that teacher did not violate student's constitutional rights by failing to report alleged sexual abuse despite state law requiring report).
Johnson v. Johnson County, 251 S.W.3d 107 (Tex. App. – Waco 2008, pet. denied) (upheld decision of the trial court granting governmental immunity in jail inmate suicide case).
Midland Indep. Sch. Dist. v. Watley, 216 S.W.3d 374 (Tex. App. – Eastland 2006, no pet.) (reversed and rendered judgment for school district and public official in retaliation/Whistleblower case).

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Berkman v. City of Keene, 311 S.W.3d 523 (Tex. App. – Waco 2009, pet. denied) (dismissed for lack of jurisdiction because contract for provision of city utilities did not fall within the limited waiver of governmental immunity for contracts).

Davis v. Dallas County Schs., 259 S.W.3d 280 (Tex. App. – Dallas 2008, no pet.) (en banc) (upheld decision of the trial court granting summary judgment in workers' compensation retaliation case).

Johnson v. Johnson County, 251 S.W.3d 107 (Tex. App. – Waco 2008, pet. denied) (upheld decision of the trial court granting governmental immunity in jail inmate suicide case).

Poteet v. Sullivan, 218 S.W.3d 780 (Tex. App. – Fort Worth 2007, pet. denied) (upheld decision of the trial court granting summary judgment to municipality in Fourth and Fifth Amendment challenge to a domestic violence civil standby).

Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546 (5th Cir. 2006) (upheld municipal ordinance in federal civil rights case involving a First Amendment challenge).

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Berkman v. City of Keene, No. 3:10-CV-2378-B, 2011 U.S. Dist. LEXIS 83580 (N.D. Tex. July 29, 2011) (prevailed on summary judgment based on *res judicata* grounds).
Gray v. Fort Worth Indep. Sch. Dist., No. 4:09-CV-225-Y, 2011 U.S. Dist. LEXIS 31235 (N.D. Tex. March 24, 2011) (prevailed on summary judgment on plaintiff's claims of substantive and procedural due process violations, Texas labor Code retaliation, and slander per se).

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I. INTRODUCTION

People frequently feel passionately about religion, their religious faith, and their children. When those passions, which can be useful in many areas, intersect in public schools, those same passions oftentimes lead to conflict and confusion about the rights and responsibilities of parents, students, teachers, administrators and everyone else involved in public education. Teachers and administrators end up with the less than desirable task of attempting to thread their way through the competing interests of their communities, seeking to avoid the legal land mines that this area of the culture wars has created.

The purpose of this paper is to provide an overview or lay of the land regarding many of the "hot" topics involving religion and public schools. These topics, many of which have been in the media over the last few years, involve controversial questions such as the rights of students and teachers to pray and pass out religious materials, the authority of public schools to implement curriculum that takes into account religious texts, and the latest round of controversies regarding high school graduations.

The paper is divided into two main sections. The first section briefly sketches the main federal and state laws that are at issue in these debates. The second section discusses various specific situations and how those laws have been applied by the courts.

II. The Laws Concerning Religion in Schools

A. The First Amendment to the U.S. Constitution

The First Amendment reads as follows: "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."

The two "religion clauses", the Establishment Clause and the Free Exercise Clause, and also the Free Speech Clause provide the initial framework for understanding the debates surrounding religion and public schools.

Very generally speaking, the Establishment Clause prohibits school districts from advancing, coercing, or endorsing one particular religion and also prohibits the endorsement of religion as opposed to non-religion. Courts have found that in order to not violate the Establishment Clause, a school district's actions must have a secular purpose, not have a primary effect of advancing or inhibiting religion, not foster an excessive government entanglement with religion, and not persuade or compel a student to participate in religious exercise. It is the courts' interpretation of the Establishment Clause that has restricted the abilities of school officials to lead prayers with their students, teach religious material, and formally include support for religion in public schools.

The current interpretation given by the courts to the Free Exercise Clause is somewhat less confusing, though its interpretation has been no less controversial. Generally speaking, the Free Exercise Clause prohibits school districts from making rules or establishing practices specifically targeting adherents of particular faiths. Neutral laws and practices of general applicability are constitutional. There is considerable debate about whether the Supreme Court is correctly interpreting the Free Exercise Clause. Many people believe that the Free Exercise Clause provides greater protection to the religious believers than is the case under current court decisions. Because of this disagreement, the Texas Legislature adopted the Texas' Religious Freedom Restoration Act, which is discussed below.

The application of the Free Speech Clause, like that of the Establishment Clause, has been a continual source of confusion. Very generally, students have certain free speech rights in public schools. However, those rights are not coextensive with the rights of adults in public places and must be considered in light of the special circumstances of the school environment. What this general principle means in terms of student rights, student discipline, and what school personnel can and cannot do is a moving target and is highly dependant on the specific circumstances, including the age of the students, their grade level, when and where the actions in question take place, who are the actors, and any reactions or disturbance caused by an incident.

In the context of the Free Speech Clause, school personnel should be familiar with the type of "forum" that exists for various types of school related activities. Depending on the type of forum that is created, school districts can impose different levels of reasonable restrictions on the time, place, and manner of speech, while not discriminating based on the viewpoint desired to be expressed.

In short, the First Amendment does not impose a prohibition on religious activity in schools. The balancing act that schools and their administrators must perform, however, is how to balance government speech concerning religion with the expression of private speech concerning religion. At the same time that schools and their administrators are journeying through the First Amendment tangle of law, they must also be aware that Texas law also must be considered.

B. The Equal Access Act.

The federal Equal Access Act was passed by Congress in 1984 to give extra-curricular student groups equal access to school premises for meetings during non-instructional (usually after school hours)

time.[1]

The Act does not apply, however, to all schools. It applies exclusively to public secondary schools that receive federal financial assistance and also only applies if the school has a "limited open forum." which is created if the school allows at least one student led non-curriculum club (e.g., a chess club). Furthermore, the meetings must be student-initiated and non-students (e.g., a church's youth pastor) may not lead or be regular attendees at the meetings. School teachers, administrators, and officials may not promote, lead or participate in the meetings, although they may be assigned to the group "for custodial purposes."

If a school fits within the Act, "school premises" includes not only classroom space, but also access to the school newspaper, bulletin boards, the public address system, and annual club fairs.

As a practical matter, The Equal Access Act reiterates and reinforces current Establishment Clause jurisprudence, which requires school district policies, including facility use policies, to be viewpoint neutral.[2] Furthermore, in Texas, the same principles are set forth in the Religious Viewpoint Anti-Discrimination Act, discussed below. Thus, even elementary schools must provide religious groups with the same access to their facilities that are provided to other community groups.

C. The Texas Religious Freedom Restoration Act.

The Texas Religious Freedom Restoration Act (TRFRA)[3] provides broad protection for religious freedom in Texas, even broader than the freedom allowed by the Free Exercise Clause of the First Amendment. The law was enacted in 1999 after a decade of wrangling at the federal level over the extent to which the Constitution and the U.S. Congress can protect religious expression at the state level.

Under TRFRA, a governmental entity (including a public school) may not "substantially burden" a person's free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.[4] "Free exercise of religion" is defined as "an act or refusal to act that is substantially motivated by a sincere religious belief."[5] Furthermore, it is not necessary to show that the adherent's "act or refusal to act" is motivated by a central part or central requirement of the person's sincere religious belief.[6]

Generally, the law comes into play when a policy or practice that is neutral on its face and applicable to all – such as a dress code or attendance policy – is challenged by a religious adherent as imposing a "substantial burden" on the practice of his faith. The published court case in which TRFRA has been applied in the school setting was recently decided by the Fifth Circuit Court of Appeals regarding an elementary school dress code.[7] In that case, the Court showed great deference to the Plaintiff's religious claims. The Court held that a claimant's religious beliefs should be not be discounted even if those beliefs are not held by all adherents of the same faith, nor should they be discounted if there are facts that show that the believer has "struggled with", or been inconsistent in adhering to, the particular religious tenet.[8]

From a practical standpoint, a school should tread carefully and lightly when a general policy, seemingly unrelated to any type of religious practice, is challenged as imposing a "substantial burden" on the exercise of a student, teacher, or employee's religion. The tolerance of religious practice demanded by TRFRA is high. To the extent that the individual's religious belief is deemed sincere, even if unconventional, a court will frequently require a school to accommodate the practice.

D. The Texas Religious Viewpoints Anti-Discrimination Act.

The Texas Religious Viewpoints Anti-discrimination Act ("TRVAA")[9] protects students' expression of religious viewpoints in their schoolwork, mandates that schools permit students to organize religiously oriented clubs and activities to the same extent that students are able to organize other clubs and activities, and requires school districts to implement local policies creating limited public forums for student speech at school events and graduation ceremonies. The TRVAA was enacted in 2007 and purports to codify in Texas federal constitutional law regarding student religious expression.

With regard to student expression of religious viewpoints in schoolwork, the TRVAA provides that students may not be either penalized or rewarded for expressing a religious viewpoint in their homework, artwork, or other classroom assignment.[10] The student work must be judged only by ordinary academic standards concerning the substance and relevance of the work, and not according to the content of the religious expression or lack thereof.[11]

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[1] 20 U.S.C. §§ 4071-4074 (2008).
[2] *See Good News Club v. Milford Cent. Schs.*, 533 U.S. 98 (2001).
[3] TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.
[4] TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.
[5] *Id.* at §110.001(a)(1).
[6] *Id.*
[7] *A.A. v. Needville Ind. Sch. Dis.*, 611 F.3d 248 (5th Cir. 2010).
[8] *Id.* at 261-262.
[9] TEX. EDUC. CODE § 25.151-.155.
[10] *Id.* at §25.153.
[11] *Id.*

Further, the TRVAA requires that schools grant the same access to school facilities and advertising opportunities to student organized, religiously oriented clubs and activities as it grants to non-religious ones. The school district may disclaim school sponsorship of such activities and groups only in a manner that neither favors nor disfavors religiously oriented student clubs and activities.[12]

The TRVAA also mandates that school districts adopt a local policy providing for the use of neutral criteria for selecting student speakers at school events including graduation ceremonies. The school district is prohibited from discriminating against a student's voluntary expression of a religious viewpoint in such a student speech, but the school district must prevent students from engaging in obscene, vulgar, lewd or indecent speech. Further, whenever a student speaker is given access to such a forum, the school district must disclaim, orally or in written form, the content of the student's message.[13]

In order to comply with the TRVAA policy mandate, a school district may choose to implement a model policy provided within the statute itself[14], or it may adopt an alternative policy such as policy FNA, provided by TASA. The model policy found within the TRVAA is a "safe harbor" provision that will enable a school district to be certain that it has complied with the TRVAA mandate.[15] However, the model policy may go too far and run afoul of federal constitutional limitations, leaving even a TRVAA compliant school district susceptible to a First Amendment challenge to their policy.

E. Texas Education Code Mandates

The Texas Education Code requires that all school districts require students to recite the Pledge of Allegiance to both the U.S. and Texas flags daily, unless a student's guardian has provided a written request for the student to be exempted.[16] In addition, following the recitation of the pledges, schools must provide a one-minute period of silence for each student to reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher must ensure that the students remain silent during that period and do not interfere with or distract other students.

Reiterating federal law under the Free Exercise Clause, the Texas Education Code also specifically states that a public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. No one may require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity.[17]

Finally, in 2007, the Texas legislature enacted a new section to the Texas Education Code, which provides that school districts may offer high school students an elective course on the impact of the Old and New Testaments of the Bible.[18] The course must maintain religious neutrality and accommodate diverse religious views. An enrichment course offered pursuant to this law should be considered a special topic in Social Studies or an independent study in English, for purposes of the Texas Essential Knowledge and Skills (TEKS).[19] Also the legislature added a requirement that all school districts offering a K-12 curriculum must include "religious literature, including the Hebrew Scriptures (Old Testament) and New Testament, and its impact on history and literature," in its enrichment curriculum.[20] This mandated "enrichment curriculum" does not need to be an independent course; the content can be integrated with the content of other courses instead.[21]

III. Applying the Law to the "Real World"

A. Student Religious Speech

The ability of students to express or practice their religion on public school grounds has been the subject of a large amount of litigation over many years, and the volume of litigation shows no signs of decreasing. These cases generally implicate the Free Exercise Clause or the Free Speech Clause and often implicate the Equal Access Act, TRFRA, and the TRVAA, as well. Here, we will give you some thumbnail guidance when these issues arise at your school.

1. Private Student Prayer at School or School Functions

a. Private Student Prayer

While any prayer or religious activity initiated or sponsored by a public school or its faculty is clearly deemed to be unconstitutional, student led or student sponsored prayer is less restricted. Generally, the following principles apply when you are faced with a student who wants to pray at school:

a. any one (student, teacher or administrator) can pray individually any time and anywhere they want, so long as they do not disrupt the activities at the school. This is a fundamental

[12] *Id*. at §25.154.
[13] *Id*. at §25.152.
[14] *Id*. at §25.156.
[15] *Id*. at §25.155.
[16] TEX. EDUC. CODE § 25.082.
[17] TEX. EDUC. CODE § 25.901.
[18] Tex. Educ. Code § 28.011.
[19] 19 TEX. ADMIN. CODE § 74.36.
[20] TEX. EDUC. CODE § 28.002(a)(2)(H).
[21] Op. Tex. Att'y Gen. No. GA-0657 (2008).

tenet imbedded in the Free Exercise Clause[22] and, as discussed above, also codified in the Texas Education Code;

b. groups of students may voluntarily pray together during non-instructional time, so long as they are not disruptive and do not harass other students;[23] and

c. organized religious gatherings (e.g.., Bible studies and "See You At The Pole" events) can be held before, during, and after school on the same terms and conditions as other secular extra-curricular activities.

Best Practice: Permit students to pray, but intervene with gentle caution if the student prayer, particularly group prayer, is taking on a proselytizing component that could be deemed to be harassing other students. Adopt well defined policies for accommodating all extra-curricular activities and events, and treat religiously tinted requests identically to secular requests.

b. Student Rights to Pass Out Religiously Themed Materials: *Morgan v. Swanson*

Prior to 1969, when the Supreme Court issued its decision in *Tinker v. Des Moines Independent Community School District*[24], public school students generally did not have the right to speak on topics of their own choosing in school.[25] Justice Thomas explained the situation a few years ago in one of his concurring opinions, early public schools "were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled 'a core of common values' in students and taught them self-control."[26]

> In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.[27]

The Supreme Court's decision in *Tinker* effected a sea change in students' speech rights, expanding them beyond anything that had previously been considered. Arguably, due to the expansiveness of the rights apparently created by *Tinker*, the Supreme Court and other courts have had to make a long series of (sometimes inconsistent) exceptions to *Tinker*'s general grant of free speech rights.

Whether or not the traditional understanding of the role of schools is correct, it was part of the general understanding of the First Amendment that existed throughout most of the history of the United States. In *Tinker*, however, the Court was faced with student anti-war demonstrators who, rather than engage in disruptive protests, merely wore black armbands to indicate their support for an end to the Vietnam War. There was no indication that the students' actions caused any sort of disruption at the school, nor was their any real indication that the presence of the students wearing black armbands was likely to cause any problems. With a factual scenario of a peaceful, non-disruptive protest and in the midst of the growing disapproval for the Vietnam War during late sixties, the Supreme Court concluded that the (mostly high school) students in *Tinker* should have a free speech right under the First Amendment to wear their armbands. The Court held that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not "materially and substantially disrupt the work and discipline of the school."

Since *Tinker* in 1969, however, every time the Supreme Court has considered the issue of student speech rights, it has narrowed and limited those rights. Thus, in *Bethel School District v. Fraser*, the Court said that school officials could restrict a high school student's freedom to give a school assembly speech containing an elaborate sexual metaphor.[28] Similarly, in 1988, the Supreme Court concluded that a school district can restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption.[29] Most recently in *Morse v. Frederick*, the Court decided that schools may restrict a student's speech if it advocates drug use.[30] As Justice Thomas pointed out, the "exceptions" to *Tinker* have been ad hoc and lack almost any sense of consistency.[31]

Schools and school officials may restrict student speech if it is:

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[22] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

[23] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

[24] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)

[25] This is some court of appeals precedent from earlier in the sixties for such rights, but, as a general matter, *Tinker* marked the beginning of any widespread belief or acceptance that public school students had affirmative speech rights. *Cf.* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U.L. REV. 1129, 1130 (2009).

[26] *Morse v. Frederick*, 551 U.S. 393, 411-412 (2007) (Thomas, J., concurring).

[27] *Id.* at 412.

[28] *Bethel School District v. Fraser*, 478 U.S. 675, 685-686 (1986).

[29] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)

[30] *Morse v. Frederick*, 551 U.S. 393 (2007).

[31] *Morse*, 551 U.S. at 421.

- Materially and substantially disruptive;
- Lewd;
- School-sponsored; or
- Promotes drug use.[32]

The Supreme Court in *Morse* left open the possibility of additional bases for regulation of student speech, as did Justice Alito in his concurring opinion.[33] What those additional exceptions might be is unclear. Within our own circuit, the Fifth Circuit, the Court of Appeals has added exceptions for viewpoint- and content-neutral regulations[34] and for situations that [pose a danger to students].[35] The various Supreme Court student speech cases did not involve any elementary school-age students and, prior to *Morgan*, it was unclear whether the First Amendment free speech clause provided affirmative speech rights to elementary school students at school.[36] In *Morgan*, however, the Fifth Circuit concluded that the free speech clause does apply to the speech of elementary school students while they are at school.[37] Unfortunately, beyond the general conclusion that the free speech clause applies in elementary schools, the Fifth Circuit was unable to garner a majority as to how the free speech clause applies in elementary schools. The only other substantive holdings from *Morgan* relate to "school-sponsored" speech and to the application of the Establishment Clause in elementary schools.

Under *Morgan*, the "school-sponsored" speech exception should be construed narrowly.[38] It only applies to activities that may fairly be characterized as part of the curriculum, which are supervised by faculty members, and designed to impart particular knowledge or skills so that the views of the individual speaker may not be erroneously attributed to the school. The classic examples are the school newspaper and school plays.[39] Neither in its discussion of *Hazelwood* nor in its application to the facts alleged in *Morgan* did the majority consider whether elementary school students might be more likely to attribute individual speech to a school. The Court merely concluded that the factual allegations, as alleged, did not indicate that they would be likely to misperceive the speech as coming from the school.[40]

The Court went on to state that the Establishment Clause draws a sharp distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[41] This conclusion is relatively uncontroversial. The significant part is relegated to a footnote: "The principals contend that elementary school students are more impressionable and therefore this case involves heightened Establishment Clause concerns. This is without merit."[42] Leaving aside the fact that the principals in *Morgan* did not make this argument, numerous courts and judges *have* made that argument, repeatedly. Moreover, it is unclear whether there was a majority ruling from the Fifth Circuit on this footnote, so the question of whether the Establishment Clause concerns permit greater restrictions in elementary

[32] *Morgan v. Swanson*, No. 09-40373, 2011 U.S. App. LEXIS 19656, at *131 (5th Cir. September 27, 2011) (en banc) (Elrod, J., majority opinion as to this issue).

[33] *Morse*, 551 U.S. at 404-406 (opi.), 422-423 (Alito, J., concurring). The Fifth Circuit has concluded that Justice Alito's concurring opinion is the controlling opinion in *Morse*. *See Morgan*, 2011 U.S. App. LEXIS 19656, at *34-*35 n.46 (Benavides, J.) (citing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007)); *see also id.* at *98 n.1 and *120 (Elrod, J.). As the Seventh Circuit has noted, Justice Alito's concurring opinion should not have been classified as the controlling opinion since Justice Alito, as part of a majority of the Supreme Court, signed the primary/majority opinion. *Nuxoll v. Indian Prairie School District*, 523 F.3d 668, 673 (7th Cir. 2008).

[34] *Morgan*, 2011 U.S. App. LEXIS 19656, at *131 (quoting *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509 (5th Cir. 2009)).

[35] *Ponce*, 508 F.3d at 770-772. This exception is not mentioned in *Morgan*, but it does not appear that the court in *Morgan* intended to disapprove *Ponce* since it is otherwise cited with approval and is not specifically rejected or overruled by the *en banc* court. However, *Morgan* generally seems to indicate that only the exceptions listed in *Morgan* are permitted: "In short, what one child says to another child is within the protection of the First Amendment unless one of the narrow exceptions discussed above applies." *Id.* at *147 (Elrod, J.).

[36] *Morgan*, 2011 U.S. App. LEXIS 19656, at *57-*58 (Benavides, J.).

[37] *Id.* at *122-*126 (Elrod, J.).

[38] *Id.* at *136.

[39] *Id.* at *136-*137.

[40] This was precisely the issue raised by the Third Circuit Court of Appeals in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271, 277 (3d Cir. 2003) (in the elementary school classroom, the "line between school-sponsored speech and merely allowable speech is blurred."). *Walz*, like *Morgan*, dealt with restrictions on the distribution of candy canes with an attached religious "Legend of the Candy Cane."

[41] *Id.* at *137 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

[42] *Id.* at *143 n.26 (relying on *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001)). The extent to which this footnote should be applied outside the specific facts of *Morgan* is unclear. This portion of Judge Elrod's opinion is only the majority opinion because of its adoption by Judge Owen. Judge Owen, however, also adopted the portion of Judge Benavides' opinion, in which he states, "in *Good News Club*, the Supreme Court *reiterated* previous precedents assigning 'significance ... in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults.'" *Id.* at *56.

schools remains open for the time being.

The following questions remain open within the Fifth Circuit:

1. Whether the "material and substantial disruption" standard applies differently in elementary schools than in high schools. Numerous courts have indicated that the "material and substantial disruption" standard would apply differently in elementary schools.[43]

2. Whether the ability of school districts to restrict lewd or inappropriate speech applies differently in elementary schools than in high schools.[44]

3. Whether the term "viewpoint discrimination" means hostility toward a particular viewpoint or merely a restriction on a certain type of viewpoint based on some other concern. For instance, some courts have distinguished between (a) restrictions on religious speech in public schools *solely* because it is religious, and (b) restrictions on religious speech because it is likely to cause offense to other students.[45]

4. Whether school districts can practice "viewpoint discrimination" against student speech that is "school-sponsored." In cases where there is no hostility to the viewpoint, numerous courts have held that school districts may restriction student speech that is "school-sponsored," as they have variously interpreted the term "school-sponsored." *Morgan* indicates that some of the Fifth Circuit judges, perhaps a majority, might reject "viewpoint discrimination," even when applied to "school-sponsored" speech.[46]

5. Whether elementary-age students are more likely to (mis)perceive private speech as "school-sponsored" or "school-endorsed." While a majority of the Fifth Circuit concluded that the facts, as alleged in *Morgan*, did indicate any likelihood that the private speech would be misperceived as "school-sponsored" or "school-endorsed," there is no clear majority ruling out the possibility that, under different factual allegations or based on evidence of what actually occurred or occurs in an elementary school, school officials might be able to impose greater restrictions under the "school-sponsored" exception or based on the Establishment Clause.

6. Whether there are additional circumstances that would justify schools districts in restricting or regulating student speech.

Best Practice: These issues are highly contentious and there are numerous groups around the country that are actively seeking for opportunities to take cases on these issues to court in hope that they will succeed, where their comrades have failed, in convincing the Supreme Court to provide clearer guidance on student speech rights involving religious speech. In some cases, parents and their children have staged situations in order to try and "catch" public school teachers and administrators into accidentally violating the Constitution or one of the statutes. When in doubt about how to proceed, the best advice is to get the district's attorneys involved on the front end. While that does not guaranty that you will avoid litigation, it will help avoid common pitfalls.

c. Public Student Prayer at School or School Functions

The Supreme Court has clearly ruled that a school may not sponsor or direct a prayer at school or at a school related event, such as a football game or a graduation ceremony.[47] This restriction extends even to a team prayer led by a coach.[48] The law is well settled that when a school or one of its faculty members sponsors or participates in a prayer at school, the activity will be deemed to be a violation of the Establishment Clause.

The United States Supreme Court has prohibited

[43] *Id.* at *43 n.72 (Benavides, J.) (briefly discussing numerous cases questioning how to apply free speech guaranties in elementary schools); *see also id.* at *70-*73.

[44] *Id.* at *73 ("[T]he threshold for what constitutes suggestive or lewd speech, as discussed in *Fraser*, might be lower in an elementary-school setting.").

[45] *Morgan* emphasizes that, "Accordingly, the principals were not permitted to discriminate on the basis of viewpoint; yet, in each incident the principals allegedly censored speech solely because it expressed a religious message." *Id.* at *139. *See also Hill v. Colorado*, 530 U.S. 703, 707-10 (2000) (finding no unconstitutional content-based discrimination where a statute restricting anti-abortion speech was not adopted "because of disagreement with the message [conveyed]"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "the principal inquiry in determining content-neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys").

[46] This discussion was, like some of Judge Elrod's other more controversial claims, relegated to a footnote. *See Morgan*, 2011 U.S. App. LEXIS 19656, at *132 n.23.

[47] *Lee v. Weisman*, 505 U.S. 577 (1992).

[48] *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d at 406.

pre-game prayers given by students.[49] However, there is considerable confusion about the extent to which a school can permit students to vote upon the delivery by a student of a message, entirely of that student's choosing, as part of graduation ceremonies. The Eleventh Circuit has authorized such a policy.[50] However, at least one federal court in Texas has ruled that a similar policy was rendered unconstitutional by the Supreme Court's decision in *Santa Fe* in 2000.[51]

The TRVAA addresses some of the concerns raised in previous public student prayer cases, particularly through the TRVAA's mandates of a limited public forum, a neutral process for selecting student speakers, and content disclaimers by the school. The impact of these provisions remains to be seen, but challenges to public student prayer continue.

Earlier this year, the public student prayer issue once again reared its head in regards to a graduation ceremony at Medina Valley ISD. Pursuant to the TRVAA and the district's historical practice, the school district planned to allow its valedictorian and other students in positions of honor to give, among other talks, an invocation and benediction. These speeches were prepared by the students and reviewed by district officials to ensure that the students' speeches stayed on topic for the event. The school district was sued, with the plaintiffs arguing that student religious speech at the graduation and in the graduation program violated the Establishment Clause. The school district argued that the TRVAA makes graduation a limited public forum and that the district could not prohibit the students' speeches, even if they contained religious speech. Although the district court initially granted a temporary restraining order against the school district prohibiting any student prayer at the graduation ceremony, the Fifth Circuit promptly reversed, stating that the plaintiffs had not shown a substantial likelihood that they would prevail.[52]

This case is on-going, though it is not clear whether the court will ultimately address the effect of the TRVAA on the issue of public student prayer at a graduation ceremony or whether Medina Valley ISD complied with the provisions of the TRVAA. If the constitutionality of the TRVAA is not decided by this court, we expect that it will be decided by another court in the near future.

Best Practice: Adopt a policy implementing the provisions of the TRVAA and follow it. Review the content of public student speeches for obscene, vulgar, lewd, or indecent speech and for compliance with time and purpose limitations, but do not edit or otherwise restrict a student's expression of a religious viewpoint. While there is some question about whether TRVAA will be struck down, it is safer to follow it. When in doubt, review your options with your legal counsel.

2. Student Work

As noted above, the TRVAA provides that students may not be either penalized or rewarded for expressing a religious viewpoint in their homework, artwork, or other classroom assignment. However, the student must comply with the requirements of the assignment, and the student's expression of a religious viewpoint in an otherwise unacceptable piece of work will not support an unearned good grade. A student assigned to paint a portrait is certainly permitted to hand in a portrait of Jesus Christ, but if it is poorly rendered and not responsive to the requirements of the assignment, the teacher is justified in giving a low grade.

Best Practice: Train teachers to respond to the quality of a student's work and remind them that they are neither to reduce nor to inflate a student's grade in response to any expression of the student's religious beliefs that may be reflected in the student's work. Advise teachers to present clear grading rubrics for assignments that might include expressions of religious belief on the part of their students.

3. Student Dress

Dress Code Policies are increasingly subject to challenge under state laws similar to the Texas Religious Freedom Restoration Act, but there are also Free Speech, Free Exercise, Establishment Clause and TRVAA implications in many of these challenges. Generally, the Courts are showing great deference to claims of a "sincerely held religious belief."[53]

[49] *Santa Fe Indep. Sch. Dist. V. Doe*, 530 U.S. 290 (2000).

[50] *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) (en banc) ("Adler II"), vacated, 531 U.S. 801 (2002), reinstated, 250 F.3d 1330 (11th Cir. 2001) ("Adler III").

[51] *Does 1-7 v. Round Rock Indep. Sch. Dist.*,540 F. Supp. 2d 735 (W.D. Tex. 2007

[52] See *Schultz v. Medina Valley Indep. Sch. Dist.*, Civil Action No. 5:11-CV-00422-FB, (W.D. Tex. June 1, 2011); *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011).

[53] Examples of such deference: A kindergartener boy was allowed to wear long hair in deference to his Native American heritage and even the school's attempt to require the hair to be in a bun or a braid tucked behind his shirt was deemed unacceptable (*A.A. v. Needville Ind. Sch. Dis.*, 611 F.3d 248 (5th Cir. Tex. 2010)); Wearing rosaries on the outside of a uniform deemed acceptable despite school's concern that the rosary was a gang symbol in that community (*Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997)); A Muslim middle school girl was allowed to wear a hijab, or headscarf (*Hearn v. Muskogee School District*, No. 6:03-cv-00598 (E.D. Okla. filed Oct. 28, 2003)); and, in perhaps the most striking example, a high school girl was permitted to wear a nose stud, claiming membership in the Church of Body

Best Practice: Be sure your dress code provides that parents may request an exemption from the one or more aspects of the dress code because of a sincerely held religious belief, and create a form available for requesting that exemption. Be willing to craft accommodations when requested unless there is a serious threat to student safety or discipline (e.g., shop class restrictions on clothing).

4. Absence for Religious Worship or Instruction

Attendance policies are also an issue to be considered in light of TRFRA. Catholic students, for example, may request time off to worship on holy days of obligation. Similarly, Muslims may request accommodation to participate in the obligatory Friday prayers, or Jumu'ah. Some schools have attempted to accommodate this practice by providing an empty classroom for students, and time off from class to conduct the prayers. These might seem to be reasonable responses under TRFRA, but they could also pose problems in other areas, such as the Equal Access Act or the Establishment Clause.

Best Practice: This issue is developing and there is no clear cut answer, but probably the best response is to permit time off for the students to attend prayer services off campus, upon receipt of written instruction from a religious authority or parent explaining that the time off is in furtherance of a sincerely held religious belief.

B. Third Party Distribution of Religious Materials

Generally, if a school is asked to distribute any literature with religious content – by a student, parent or third party – the school must treat the request the same as any other request containing no religious content. The federal Equal Access Act applies here, and the school should treat a literature distribution request in the same manner it treats a request for use of its facilities: every request must be treated the same, regardless of the content. By permitting literature distribution on campus, the school is creating a "limited public forum," and it must be viewpoint neutral in its distribution of literature.[54] It can impose reasonable time, manner and place restrictions and it should prohibit school staff from being involved in the distribution.[55] For example, a school might require all materials to be set on a table in the front office, or that distribution can never take place during instructional time. However, as a word of caution, some courts have concluded that school districts may or, in some cases, must prohibit materials that contain "proselytizing" language. It does not appear that such restrictions will be permitted in the Fifth Circuit, though the issue is undecided.

Best Practices: Adopt written policies and guidelines for the distribution of literature and apply them consistently. Texas Association of School Boards has well developed policies along these lines that have been tested and proven in court.[56]

C. What Can School Personnel Do and What Can Be Prevented

1. In-School Teacher Speech

A teacher's right to engage in speech at school is reconciled with the employer's right to protect its own legitimate interests in performing its mission. On multiple occasions, courts have held that freedom of speech does not entitle teachers to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.[57] Recently, the Ninth Circuit held that a math teacher's freedom of speech rights were not violated when the school ordered him to take down banners in his classroom that displayed in large block type: "IN GOD WE TRUST"; ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE."[58] Similarly, the Fourth Circuit has held that a school board did not infringe the rights of a teacher when it ordered him to remove religious material from a classroom bulletin board.[59]

Best Practices: Teachers should steer clear of

Modification; the church has a website and claims 3,500 members nationwide (*Iacono v. Croom*, No. 5:10-CV-416-H, 2010 U.S. Dist. LEXIS 108153 (E.D.N.C. Oct. 8, 2010).

[54] Some examples: A school district's refusal to allow distribution of camp brochures expressing a religious viewpoint was unconstitutional (*Hills v. Scottsdale Unif. Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003) (per curiam)); A Christian youth group was permitted to access a school's distribution system for distributing and posting nonschool materials to students (*Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.* 233 F. Supp 2d 647 (D.N.J. 2002);

[55] For example, a Florida School District implemented guidelines for the distribution of books and literature that required them to be available to students only at a designated location, that all faiths be allowed to provide materials, and that school staff not be permitted to participate in any way in the distribution. *Meltzerv. Bd. Of Public Instruction of Orange County, Florida*, 577 F.2d 311, 313-314 (5th Cir. 1978), *cert denied*, 439 U.S. 1089 (1972).

[56] *See Pounds v. Katy Indep. Sch. Dist.*,517 F. Supp. 2d 901 (S.D. Tex 2007).

[57] *Brammer-Hoelter v. Twin Peaks Charter Acad*., 492 F.3d 1192, 1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp*., 474 F.3d 477, 479-80 (7th Cir. 2007).

[58] *Johnson v. Poway Unified Sch. Dist.*, No. 10-55445, 2011 U.S. App. LEXIS 18882 (9th Cir. Sept. 13, 2011).

[59] *Lee v. York Cnty. Sch. Div*., 484 F.3d 687, 700 (4th Cir. 2007)

using their public positions as a pulpit from which to preach their views. Instead, in-school speech by teachers should focus on the approved curriculum.

2. Instruction With Religious Content

Even though Texas adopted a law in 2007 permitting schools to offer a high school course on the Bible (the law is described above in the section entitled, "Texas Education Code Mandates"), the issue of what type of religious topics can and cannot be taught in the classroom remains controversial. In fact, the new Texas law itself requires that any course offered on the Bible comply with general constitutional law premises in this area. Thus, the course must be offered for a secular purpose in an academic manner that neither fosters nor demeans any religious tenet, but instead fosters knowledge and appreciation of the role of religious heritage.[60] However, because the law is so new, there are very few specific guidelines as to what can and cannot be included in the Bible curriculum.[61]

The same general guidelines apply to any religious content in any course: the content must have a secular purpose and not promote one religion over another. For example, the courts have held that a school may include religious literature, music, drama, and arts in its curriculum and its school activities when the material has secular value independent of its religious content. For example, a school choir can include religious songs in its repertoire if those songs have musical merit.[62]

Best Practices: As for the new Texas law regarding Bible instruction, seek legal review of any proposed curriculum before implementing. This area will be dicey in Texas until standards are better designed. As for the teaching of religious topics in other courses, we recommend teacher training on this issue. The training should explain that religion is not a forbidden topic in school (indeed, banning the topic altogether is as problematic as an excessive attention to it), but that the school cannot show preference for one religion, or for a non-religion, and it must show respect for the vast array of religions viewpoints that might be expressed among the students.

3. Pledges of Allegiance and Moment of Silence

As noted above, the Texas Education Code now mandates daily recitation of the Pledges of Allegiance to the U.S. and Texas flags, followed by a one-minute moment of silence.[63] During the moment of silence, a student "may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student."

In order for a moment of silence to be Constitutional it must meet a three part test: it must have at least some secular purpose, its primary effect cannot be to advance or inhibit religion, and the law must not foster an excessive government entanglement with religion.[64] If there is no secular purpose, then a court need not analyze the remaining two factors.[65]

In 2010, the Fifth Circuit Court of Appeals upheld the pledge recitation requirement and also found that the recent addition of "under God" to the Texas pledge was constitutional.[66] The moment of silence is constitutional because it had secular purposes: fostering patriotism and providing a period for thoughtful contemplation.[67] The court found that the obvious purpose of the pledge was to foster patriotism.[68]

Additionally, the court also held that there was no evidence that the moment of silence's primary effect was to advance religion, as students could do other silent activities besides praying.[69] In another case from the Seventh Circuit in which a moment of silence statute was upheld, the court found that it was not required that the statute expressly allow for "other silent activity" in order for the statute to be considered Constitutional.[70] Finally, Fifth Circuit, in its review of the issue, found that having teachers enforce silence did not entail an excessive government entanglement with religion.[71]

In short, moments of silence are permissible if their purpose is not solely to allow prayer in schools.[72]

Best Practice: Be sure to follow the Texas Education Code provisions, described above, in policy and practice.

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[60] *See Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (Pennsylvania law mandating daily reading of a Bible passage declared a violation of the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Arkansas law prohibiting the teaching of evolution violated the Establishment Clause).

[61] California has developed a fairly comprehensive plan for instruction on religious topics, which might offer some guidance for Texans. *See* California Department of Education, *History-Social Science Framework for California Public Schools: Kindergarten through Grade Twelve* 207-11 (2005), *available at* http://www.cde.ca.gov/ci/cr/cf/documents/histsocsciframe.pdf.

[62] *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997).

[63] Tex. Educ. Code § 25.082.

[64] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985).

[65] *Wallace*, 472 U.S. at 56.

[66] *Croft v. Perry*, 624 F. 3d. 157 (5th Cir. 2010)

[67] *Id*. at 746.

[68] *Id*. at 747.

[69] *Id*. at 749-750.

[70] *Sherman v. Koch*, 623 F.3d 501, 516-517 (7th Cir. 2010).

[71] *Id*. at 750.

[72] *Wallace*, 472 U.S. at 56-57, 61.

4. Inviting Clergy to School or School Events

The entire line of "prayer in public schools" cases have made it clear that schools cannot invite clergy to say prayers at public events, nor can it sponsor a Baccalaureate service for graduating Seniors.[73] However, privately organized Baccalaureate services are clearly constitutional. A few cases have arisen wherein schools have invited clergy to some program or activity. For example, the Beaumont Independent School District had a "clergy in schools" program, which placed clerical volunteers from the community in the school district's primary and secondary schools to counsel and mentor students on secular topics. The program was held to violate the Establishment Clause because it did not include non-religious counselors in its program, and thereby favored religion over non-religion.[74]

Best Practices: Clergy should only be invited to participate in a program at school if other non-religious individuals are invited on the same basis. For example, clergy could be invited to a career day, so long as secular careers were also represented. Clergy might be invited to participate in a counseling program, but only if non-clergy counselors participated on an equal basis.

5. School Board Prayers

Many public school board meetings open with a prayer. Courts that have considered the issue have had to decide whether these prayers should be treated under the line of cases dealing with "school sponsored prayer," which is prohibited by the Establishment Clause (discussed above) or rather the prayer of a "legislative and deliberative body," which is generally permitted. Though there are cases that tend to treat these prayers the same as any other school sponsored prayer and to find them unconstitutional, it is still an open question in the Fifth Circuit whether these prayers are unconstitutional.[75]

Best Practices: Given the ambiguity in the law at this time in the Fifth Circuit, Board members should be aware that prayers during a board meeting could result in a lawsuit. Interested individuals can always meet before the meeting to pray for the meeting, so long as school officials do not sponsor or promote the prayer. Board members should consult their legal counsel if questions arise.

6. Displays of the 10 Commandments

Many cases throughout the country have been brought against schools and other entities protesting the public display of the Ten Commandments or displays expressing founding principles of the law that make reference to God. The most recent case was just filed in Virginia by the ACLU.[76] There is no clear consensus among the courts, but the underlying principle is that the display must have been initiated and implemented with a secular purpose. Furthermore, the Supreme Court has noted (in a 10 Commandments Case originating in Texas) that courts should be "especially vigilant" in Establishment Clause cases in elementary and secondary schools.[77]

Best Practices: Displays relating to the origin of our laws should be implemented with a secular purpose and should include an array of sources, not only the 10 Commandments (e.g., the Justinian Code, the Magna Carta, the Mayflower Compact, the Declaration of Independence, the Gettysburg Address, and the like).

7. Holiday Ceremonies/Parties

The United States Supreme Court has determined that schools may celebrate the holidays and create displays as long as they do so within "the context of the Christmas season" and the religious component of their display does not dominate but simply represents one element of a holiday that has obtained secular status in our society.[78] Thus, Christmas programs that include Christmas carols such as "Silent Night" and "O Come All Ye Faithful" do not violate the Establishment Clause so long as the program is part of the educational efforts of the school.[79] Likewise, religious symbols "may be used only as a teaching aid or resources and only if they are displayed as part of the cultural and religious heritage of the holiday and are temporary in nature."[80]

Best Practices: Do not force students to participate in any event that offends his or her beliefs. Likewise, school officials should make every effort to accommodate diverse faiths during the holiday season by including their customs, songs, and traditional foods.

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[73] *See Lee v. Weisman,* 505 U.S. 577, and *Santa Fe Ind. Sch. Dist. v. Doe,* both discussed above.

[74] Oxford v. Beaumont Indep. Sch. Dist., 224 F. Supp. 2d 1099 (E.D. Tex. 2002), following *Doe v. Beaumont Ind. Sch. Dist.*, 240 F.3d 462 (5th Cir. Tex. 2001).

[75] See *Doe v. Indian River Sch. Dist.*, 2011 U.S. App. LEXIS 16121 (3d Cir. Del. Aug. 5, 2011); *Marsh Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999);. The only time the issue has been presented to the 5th Circuit Court of Appeals, the Court found that the Plaintiffs had no standing to sue because there was no evidence that they ever attended the school board meetings (*Doe v. Tangipahoa Parish School System*, 494 F. 3d 494 (5th Cir. La. 2007)).

[76] Doe1 v. School Board of Giles County (W.D. VA, flied 9/13/2011).

[77] *Van Orden v. Perry*, 545 U.S. 677 (2005).

[78] *Lynch v. Donnelly*, 465.U.S. 668, 679, and 691 (1984).

[79] *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980).

[80] *Id.* at 1317.