



# Center for Law & Religious Freedom

8001 Braddock Road, Ste 302  
Springfield, VA 22151  
(703) 894-1087  
fax (703) 642-1075

November 19, 2018

Chairwoman Peggy Lehner  
Senate Education Committee  
The Ohio Senate  
Senate Building  
1 Capitol Square, 1<sup>st</sup> Floor  
Columbus, Ohio 43215

**Re: Support for HB 428**

Dear Chairwoman Lehner:

The Center for Law & Religious Freedom is the legal advocacy arm of the Christian Legal Society, a nondenominational association of Christian attorneys, law students, and law professors with attorney chapters nationwide, including in Ohio, and student chapters at 90 law schools, including at the Ohio State University Moritz College of Law and the University of Toledo College of Law. For four decades, the Center has worked to protect students' right to be free from discriminatory treatment of their religious expression while at school. For example, the Center was instrumental in the passage of the Equal Access Act, 20 U.S.C. §§ 4071-4074, passed by Congress in 1984 to protect the right of students to meet for religious speech on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982) (statement of Sen Hatfield). The Center was a primary drafter, along with the American Jewish Congress and other organizations, of *Religion in the Public Schools: A Joint Statement of Current Law* (Attachment C).<sup>1</sup> That statement became the basis for the Clinton Administration's Department of Education's guidance letters regarding *Religious Expression in Public Schools*, issued to school administrators in 1995, 1998, and 1999 (Attachment A)<sup>2</sup>, and the corresponding Bush Administration's Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Attachment B)<sup>3</sup>, published at 68 Fed. Reg. 9645 (Feb. 28, 2003).

Completely consistent with the guidance offered by both the Clinton and Bush Administrations, HB 428 merits bipartisan support as an important effort to ensure that students' religious expression is protected in Ohio's schools. HB 428 is consonant with the entire First Amendment: It protects public school students' right to express their religious beliefs as protected by the Free Speech and Free Exercise Clauses, while respecting the boundary set by the Establishment Clause that requires the government to be neutral in its treatment of students' religious expression. As the United States Supreme Court has explained, in the public schools,

---

<sup>1</sup> The Joint Statement (Attachment C) is available at <http://files.eric.ed.gov/fulltext/ED387390.pdf> (last accessed Nov. 19, 2018).

<sup>2</sup> The Clinton DOE guidance letter (Attachment A) is available at <http://files.eric.ed.gov/fulltext/ED416591.pdf> (letter dated May 30, 19998) (last accessed Nov. 19, 2018).

<sup>3</sup> The Bush DOE guidance, 68 Fed. Reg. 9645 (Feb. 28, 2003) (Attachment B) is available at <https://www.gpo.gov/fdsys/pkg/FR-2003-02-28/pdf/03-4693.pdf> (last accessed Nov. 19, 2018).

“there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (upholding the Equal Access Act’s requirement that public secondary schools allow students to meet for prayer, Bible study, and religious discussions) (emphases in original). See also, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (Free Speech Clause of First Amendment requires elementary schools to allow religious community groups to meet in elementary schools immediately after school, and Establishment Clause is not violated).

Specifically, in § 3320.01, HB 428 protects several types of students’ religious expression, including prayer. As the Supreme Court has explained, “religious worship and discussion . . . are forms of speech and association protected by the First Amendment.” *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

By explicitly protecting students’ prayer groups, religious clubs, “see you at the pole” gatherings, and other religious gatherings, HB 428 tracks the Bush Administration’s Department of Education’s *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003) (“Students may organize prayer groups, religious clubs, and ‘see you at the pole’ gatherings”) (Attachment B). HB 428 similarly tracks the Clinton Department of Education’s guidance letter (Attachment A), which stated:

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. . . . Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. . . .

Students may also participate in before or after school events with religious content, such as “see you at the flag pole” gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

HB 428, in § 3320.01, also protects students' distribution of written materials or literature of a religious nature. Again, HB 428 parallels the Clinton DOE guidance letter, which stated:

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

When HB 428, in § 3320.01, protects students' wearing of symbolic clothing or the expression of a religious viewpoint, it draws upon the Clinton DOE guidance letter, which stated:

Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

HB 428, in § 3320.02(A), further protects students' religious expression before, during, and after school hours to the same extent as a student is permitted to engage in secular activities and expression. This echoes the Clinton DOE guidance letter in the section already quoted above, as well as the Bush DOE guidance. 68 Fed. Reg. 9635, 9647 (Feb. 28, 2003).

In § 3320.02(B), HB 428 protects students' access to school facilities for meetings for the purpose of engaging in religious expression on the same basis as other student groups have access to school facilities. This protection is required by the federal Equal Access Act, 20 U.S.C. §§ 4071-4074, which was upheld by the Supreme Court in *Board of Education v. Mergens*, 496 U.S. 226 (1990). Again, the Clinton DOE guidance letter affirmed that "[t]he Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities." The Bush DOE guidance likewise protects religious student groups. 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

HB 428, in § 3320.03, protects students' right to engage in religious expression in their homework, artwork, or other written or oral assignments and protects students from being penalized or rewarded based on the religious content of their schoolwork. Again, HB 428 is reinforced by the Clinton DOE guidance letter, which stated:

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work

Letter to Chairwoman Peggy Lehner  
Ohio Senate Education Committee  
November 19, 2018  
Page 4 of 4

should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

The Bush DOE guidance contains this same language. 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

HB 428 also authorizes a school district to provide for a moment of silence during the school day for prayer, reflection, or meditation upon a moral, philosophical, or patriotic theme. HB 428 prohibits mandatory participation in the moment of silence. Moment of silence laws have been upheld by the Fourth, Fifth, Seventh, and Eleventh Circuits. See *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11<sup>th</sup> Cir. 1997); *Brown v. Gilmore*, 258 F.3d 265 (4<sup>th</sup> Cir. 2001); *Croft v. Governor of Texas*, 562 F.3d 735 (5<sup>th</sup> Cir. 2009); *Sherman v. Koch*, 623 F.3d 501 (7<sup>th</sup> Cir. 2010).

HB 428 is win-win legislation. Not only will it protect students' religious expression, but it also will help school districts and school administrators avoid costly legal mistakes and, therefore, will save taxpayer money. Too often, problems involving religious expression in the public schools arise when school administrators mistakenly think that they must censor students' religious expression in order to avoid a violation of the Establishment Clause. School administrators' mistakes then lead to unnecessary litigation that wastes taxpayer money. By clarifying that students' religious expression is protected in Ohio schools, HB 428 helps school districts avoid unnecessary and costly mistakes.

But most importantly, it ensures that Ohio's public schools teach students the invaluable lesson that freedom of speech and free exercise of religion are inalienable rights. Government officials, including public school administrators, may not censor personal religious expression. As the Sixth Circuit noted in a case about religious expression in Ohio public schools, "[s]chools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons." *Rusk v. Crestview School District*, 379 F.3d 418, 422 (6<sup>th</sup> Cir. 2004) (quotation marks and citation omitted).

For the foregoing reasons, HB 428 merits bipartisan support. If I can be of further assistance to the Committee, please contact me at (703) 894-1087 or [kcolby@clsnet.org](mailto:kcolby@clsnet.org).

Yours truly,

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby  
Director, Center for Law and Religious Freedom  
Christian Legal Society  
(703) 894-1087  
[kcolby@clsnet.org](mailto:kcolby@clsnet.org)

## ATTACHMENT A

DOCUMENT RESUME

ED 416 591

EA 029 152

TITLE Religious Expression in Public Schools: A Statement of Principles.

INSTITUTION Department of Education, Washington, DC.

PUB DATE 1998-06-00

NOTE 12p.

PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC01 Plus Postage.

DESCRIPTORS Board of Education Policy; Commencement Ceremonies; Compliance (Legal); Constitutional Law; Court Litigation; Elementary Secondary Education; Federal Courts; \*Federal Regulation; Government Publications; Guidelines; Parent School Relationship; \*Public Schools; \*Religion; Religion Studies; \*School Prayer; \*State Church Separation; Student Rights

IDENTIFIERS Equal Access Act 1984; \*First Amendment; \*Religious Exercises; Religious Freedom; Supreme Court

ABSTRACT

These guidelines, addressing the extent to which religious expression and activity are permitted in public schools, were originally issued in 1995. Changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in "Boerne v. Flores" declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments. Richard W. Riley, U.S. Secretary of Education, suggests in his introduction that school districts should use the guidelines to revise their own districtwide policies regarding religious expression and inform teachers, parents, and students about religious expression in school. Two basic and equally important obligations are imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. The principles are applied to the following topics: (1) student prayer and religious discussion; (2) graduation prayer and baccalaureates; (3) official neutrality regarding religious activity; (4) teaching about religion; (5) student assignments; (6) religious literature; (7) religious excusals; (8) released time; (9) teaching values; (10) student garb; and (11) provisions of the Equal Access Act. A list of eight associations and groups that can answer questions on religious expression in public schools is appended. (MLF)

\*\*\*\*\*  
\* Reproductions supplied by EDRS are the best that can be made \*  
\* from the original document. \*  
\*\*\*\*\*

# RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS: A STATEMENT OF PRINCIPLES

U.S. DEPARTMENT OF EDUCATION  
Office of Educational Research and Improvement  
EDUCATIONAL RESOURCES INFORMATION  
CENTER (ERIC)

- This document has been reproduced as received from the person or organization originating it.
- Minor changes have been made to improve reproduction quality.

---

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.



U.S. Department of Education  
June 1998

BEST COPY AVAILABLE



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF THE SECRETARY

*"...Schools do more than train their children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help our schools do this is by supporting students' rights to voluntarily practice their religious beliefs in schools....For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works.*

*President Clinton  
May 30, 1998*

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on Religious Expression in Public Schools in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (Chandler v. James) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in Boerne v. Flores declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site ([www.ed.gov](http://www.ed.gov)) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

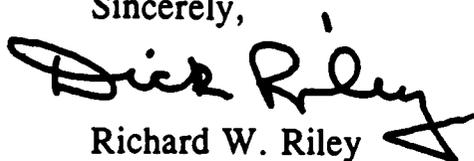
Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America -- that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,



Richard W. Riley  
U.S. Secretary of Education

### **RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS**

**Student prayer and religious discussion:** The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

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

**Religious excusals:** Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

**Released time:** Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

**Teaching values:** Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

**Student garb:** Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

### **THE EQUAL ACCESS ACT**

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

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

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

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

Revised May 1998

**List of organizations that can answer questions on religious expression in public schools**

<p align="center"><b>Religious Action Center of Reform Judaism</b></p> <p>Name: Rabbi David Saperstein Address: 2027 Massachusetts Ave., NW Washington, DC 20036 Phone: (202) 387-2800 Fax: (202) 667-9070 E-Mail: rac@uahc.org Web site: www.cdinet.com/RAC/</p>	<p align="center"><b>American Association of School Administrators</b></p> <p>Name: Andrew Rotherham Address: 1801 N. Moore St. Arlington, VA 22209 Phone: (703) 528-0700 Fax: (703) 528-2146 E-Mail: arotherham@aasa.org Web site: www.aasa.org</p>
<p align="center"><b>American Jewish Congress</b></p> <p>Name: Marc Stern Address: 15 East 84th Street New York, NY 10028 Phone: (212) 360-1545 Fax: (212) 861-7056 E-Mail: Marc_S_AJC@aol.com Web site:</p>	<p align="center"><b>National PTA</b></p> <p>Name: Maribeth Oakes Address: 1090 Vermont Ave., NW, Suite 1200 Washington, DC 20005 Phone: (202) 289-6790 Fax: (202) 289-6791 E-Mail: m_oakes@pta.org Web site: www.pta.org</p>
<p align="center"><b>Christian Legal Society</b></p> <p>Name: Steven McFarland Address: 4208 Evergreen Lane, #222 Annandale, VA 22003 Phone: (703) 642-1070 Fax: (703) 642-1075 E-Mail: clrf@mindspring.com Web site: www.clsnet.com</p>	<p align="center"><b>National Association of Evangelicals</b></p> <p>Name: Forest Montgomery Address: 1023 15th Street, NW #500 Washington, DC 20005 Phone: (202) 789-1011 Fax: (202) 842-0392 E-Mail: oga@nae.net Web site: www.nae.net</p>
<p align="center"><b>National School Boards Association</b></p> <p>Name: Laurie Westley Address: 1680 Duke Street Alexandria, VA 22314 Phone: (703) 838-6703 Fax: (703) 548-5613 E-Mail: lwestley@nsba.org Web site: www.nsba.org</p>	<p align="center"><b>Freedom Forum</b></p> <p>Name: Charles Haynes Address: 1101 Wilson Blvd. Arlington, VA 22209 Phone: (703) 528-0800 Fax: (703) 284-2879 E-Mail: chaines@freedomforum.org Web site: www.freedomforum.org</p>

**ATTACHMENT B**



# Federal Register

---

2-28-03

Vol. 68 No. 40

Pages 9503-9850

Friday

Feb. 28, 2003

Dated: February 25, 2003.

**John D. Tressler, Leader,**

*Regulatory Management Group, Office of the Chief Information Officer.*

**Office of Elementary and Secondary Education**

*Type of Review:* Extension of a currently approved collection.

*Title:* Migrant Education Program (MEP) Proposed Regulations, Sections 200.83, 200.84, and 200.88 (KA).

*Frequency:* Biennially, Other: One time.

*Affected Public:* Individuals or household. Reporting and Recordkeeping Hour

**Burden:**

Responses: 43.

Burden Hours: 19925.

*Abstract:* §200.83 of the regulations for Title I, Part C establish the minimum requirements an SEA must meet for development of a comprehensive needs assessment and plan for service delivery as required under Section 1306(b) of the Elementary and Secondary Education Act (ESEA), as amended (Pub. L. 107-110). §200.84 of the regulations establish the minimum requirements the SEA must meet to implement the program evaluation required under Section 1304(c)(2) of ESEA. §200.88 of the regulations clarify that, for the purposes of the MEP, only "supplemental" State or local funds that are used for programs specifically designed to meet the unique needs of migratory children can be excluded in terms of determining compliance with the "comparability" and "supplement, not supplant" provisions of the statute.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202-4651 or directed to her e-mail address [Vivian.Reese@ed.gov](mailto:Vivian.Reese@ed.gov). Requests may also be faxed to 202-708-9346. *Please specify the complete title of the information collection when making your request.* Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address [Joe.Schubart@ed.gov](mailto:Joe.Schubart@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

**Federal Student Aid**

*Type of Review:* Revision of a currently approved collection.

*Title:* Federal Perkins/NDSL Loan Assignment Form (JS).

*Frequency:* On Occasion.

*Affected Public:* Not-for-profit institutions (primary); Businesses or other for-profit (primary); Individuals or household.

*Reporting and Recordkeeping Hour*

**Burden:**

Responses: 21262;

Burden Hours: 8505.

*Abstract:* This form is used to collect pertinent data regarding student loans from institutions participating in the Federal Perkins Loan Program. The Perkins Assignment Form serves as the transmittal document in the assignment of such loans to the Federal government.

Written requests for information should be addressed to Vivian Reese, Department of

Education, 400 Maryland Avenue, SW, Room 4050, Regional Office Building 3, Washington, DC 20202-4651 or directed to her e-mail address [Vivian.Reese@ed.gov](mailto:Vivian.Reese@ed.gov). Requests may also be faxed to 202-708-9346. *Please specify the complete title of the information collection when making your request.* Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address [Joe.Schubart@ed.gov](mailto:Joe.Schubart@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

**Office of Postsecondary Education**

*Type of Review:* Revision.

*Title:* The Evaluation of Exchange, Language, International and Area Studies (EELIAS), NRC, FLAS, IIPP, UISFUL, BIE, CIBE, AORC, Language Resource Centers (LRC), International Studies and Research (IRS), Fulbright-Hays Faculty Research Abroad (FRA), Fulbright-Hays Doctoral Dissertation Research Abroad (DDRA), Fulbright-Hays Seminars Abroad (SA), Fulbright-Hays Group Projects Abroad (GPA), and the Technology Innovation and Cooperation for Foreign Information Access (TICFIA) programs.

*Frequency:* Annually.

*Affected Public:* Not-for-profit institutions.

*Reporting and Recordkeeping Hour*

**Burden:**

Responses: 2,595;

Burden Hours: 30,770.

*Abstract:* LRC, IRS, FRA, DDRA, SA, GPA, and TICFIA are being added for clearance to the system that already contains seven other programs. Information collection assist International Education and Graduate Programs Services (IEGPS) in meeting program planning and evaluation requirements. Program officers require performance information to justify continuation funding, and grantees use this information for self evaluations and to request continuation funding from the Department of Education.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 4050, Regional Office Building 3, Washington, DC 20202-4651 or to the e-mail address [vivian\\_reese@ed.gov](mailto:vivian_reese@ed.gov). Requests may also be faxed to 202-708-9346. *Please specify the complete title of the information collection when making your request.*

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address [Joe.Schubart@ed.gov](mailto:Joe.Schubart@ed.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

[FR Doc. 03-4748 Filed 2-27-03; 8:45 am]

**BILLING CODE 4000-01-P**

**DEPARTMENT OF EDUCATION**

**Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools**

**AGENCY:** Department of Education.

**ACTION:** Notice of availability.

**SUMMARY:** As required by section 9524 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001 (NCLB), the Secretary of Education on February 7, 2003, issued guidance on constitutionally protected prayer in public elementary and secondary schools. The purpose of this guidance is to provide State educational agencies (SEAs), local educational agencies (LEAs), and the public with information on this important topic. The guidance also sets forth and explains the responsibilities of SEAs and LEAs with respect to this aspect of the NCLB. This guidance is set forth in the appendix to this notice.

**FOR FURTHER INFORMATION CONTACT:**

Jeanette Lim, Office of Elementary and Secondary Education, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202-2241.

Telephone: (202) 401-0113. Information on this guidance is available on the Internet through the Department of Education's Web site at: <http://www.ed.gov/inits/religionandschools/>.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** As a condition of receiving funds under the Elementary and Secondary Education Act, an LEA must certify in writing to its SEA that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.

The guidance clarifies the rights of students to pray in public schools. As stated in the guidance, " \* \* \* the First Amendment forbids religious activity that is sponsored by the government but protects religious activity that is initiated by private individuals" such as students. Therefore, "[a]mong other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other noninstructional time to the same extent that they may engage in nonreligious activities." Public schools should not be hostile to the religious rights of their students and their families.

At the same time, school officials may not “compel students to participate in prayer or other religious activities.” Nor may teachers, school administrators, and other school employees, when acting in their official capacities as representatives of the State, encourage or discourage prayer or actively participate in those activities with students.

#### Electronic Access to this Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: [www.ed.gov/legislation/FedRegister](http://www.ed.gov/legislation/FedRegister).

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO access at: <http://www.access.gpo.gov/nara/index.html>.

(Authority: 20 U.S.C. 7904).

Dated: February 24, 2003.

**Rod Paige,**

*Secretary of Education.*

### Appendix—Guidance on Constitutionally Protected Prayer In Public Elementary and Secondary Schools—February 7, 2003

#### Introduction

Section 9524 of the Elementary and Secondary Education Act (“ESEA”) of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary to issue guidance on constitutionally protected prayer in public elementary and secondary schools. In addition, section 9524 requires that, as a condition of receiving ESEA funds, a local educational agency (“LEA”) must certify in writing to its State educational agency (“SEA”) that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.

The purpose of this guidance is to provide SEAs, LEAs, and the public with information on the current state of the law concerning constitutionally protected prayer in the public schools, and thus to clarify the extent to which prayer in public schools is legally protected. This guidance also sets forth the responsibilities of SEAs and LEAs with respect to Section 9524 of the ESEA. As required by the Act, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the

law. It will be made available on the Internet through the Department of Education’s Web site ([www.ed.gov](http://www.ed.gov)). The guidance will be updated on a biennial basis, beginning in September 2004, and provided to SEAs, LEAs, and the public.

#### The Section 9524 Certification Process

In order to receive funds under the ESEA, an LEA must certify in writing to its SEA that no policy of the LEA prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance. An LEA must provide this certification to the SEA by October 1, 2002, and by October 1 of each subsequent year during which the LEA participates in an ESEA program. However, as a transitional matter, given the timing of this guidance, the initial certification must be provided by an LEA to the SEA by March 15, 2003.

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

By November 1 of each year, starting in 2002, the SEA must send to the Secretary a list of those LEAs that have not filed the required certification or against which complaints have been made to the SEA that the LEA is not in compliance with this guidance. However, as a transitional matter, given the timing of this guidance, the list otherwise due November 1, 2002, must be sent to the Secretary by April 15, 2003. This list should be sent to:

Office of Elementary and Secondary Education, *Attention:* Jeanette Lim, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

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

#### Enforcement of Section 9524

LEAs are required to file the certification as a condition of receiving funds under the ESEA. If an LEA fails to file the required certification, or files it in bad faith, the SEA should ensure compliance in accordance with its regular enforcement procedures. The Secretary considers an LEA to have filed a certification in bad faith if the LEA files the certification even though it has a policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance.

The General Education Provisions Act (“GEPA”) authorizes the Secretary to bring

enforcement actions against recipients of Federal education funds that are not in compliance with the law. Such measures may include withholding funds until the recipient comes into compliance. Section 9524 provides the Secretary with specific authority to issue and enforce orders with respect to an LEA that fails to provide the required certification to its SEA or files the certification in bad faith.

#### Overview of Governing Constitutional Principles

The relationship between religion and government in the United States is governed by the First Amendment to the Constitution, which both prevents the government from establishing religion and protects privately initiated religious expression and activities from government interference and discrimination.<sup>1</sup> The First Amendment thus establishes certain limits on the conduct of public school officials as it relates to religious activity, including prayer.

The legal rules that govern the issue of constitutionally protected prayer in the public schools are similar to those that govern religious expression generally. Thus, in discussing the operation of Section 9524 of the ESEA, this guidance sometimes speaks in terms of “religious expression.” There are a variety of issues relating to religion in the public schools, however, that this guidance is not intended to address.

The Supreme Court has repeatedly held that the First Amendment requires public school officials to be neutral in their treatment of religion, showing neither favoritism toward nor hostility against religious expression such as prayer.<sup>2</sup> Accordingly, the First Amendment forbids religious activity that is sponsored by the government but protects religious activity that is initiated by private individuals, and the line between government-sponsored and privately initiated religious expression is vital to a proper understanding of the First Amendment’s scope. As the Court has explained in several cases, “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>3</sup>

The Supreme Court’s decisions over the past forty years set forth principles that distinguish impermissible governmental religious speech from the constitutionally protected private religious speech of students. For example, teachers and other public school officials may not lead their classes in prayer, devotional readings from the Bible, or other religious activities.<sup>4</sup> Nor may school officials attempt to persuade or compel students to participate in prayer or other religious activities.<sup>5</sup> Such conduct is “attributable to the State” and thus violates the Establishment Clause.<sup>6</sup>

Similarly, public school officials may not themselves decide that prayer should be included in school-sponsored events. In *Lee v. Weisman*,<sup>7</sup> for example, the Supreme Court held that public school officials violated the Constitution in inviting a member of the clergy to deliver a prayer at a graduation ceremony. Nor may school officials grant

religious speakers preferential access to public audiences, or otherwise select public speakers on a basis that favors religious speech. In *Santa Fe Independent School District v. Doe*,<sup>8</sup> for example, the Court invalidated a school's football game speaker policy on the ground that it was designed by school officials to result in pregame prayer, thus favoring religious expression over secular expression.

Although the Constitution forbids public school officials from directing or favoring prayer, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"<sup>9</sup> and the Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."<sup>10</sup> Moreover, not all religious speech that takes place in the public schools or at school-sponsored events is governmental speech.<sup>11</sup> For example, "nothing in the Constitution \* \* \* prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday,"<sup>12</sup> and students may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech. Likewise, local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities,<sup>13</sup> but they may not structure or administer such rules to discriminate against student prayer or religious speech. For instance, where schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the state and therefore may not be restricted because of its religious content.<sup>14</sup> Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience.<sup>15</sup> As the Supreme Court has explained: "The proposition that schools do not endorse everything they fail to censor is not complicated,"<sup>16</sup> and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.<sup>17</sup>

### **Applying the Governing Principles in Particular Contexts**

#### *Prayer During Noninstructional Time*

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities. While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.

#### *Organized Prayer Groups and Activities*

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray. School authorities may disclaim sponsorship of non-curricular groups and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

#### *Teachers, Administrators, and other School Employees*

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

#### *Moments of Silence*

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

#### *Accommodation of Prayer During Instructional Time*

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

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

#### *Religious Expression and Prayer in Class Assignments*

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

#### *Student Assemblies and Extracurricular Events*

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

#### *Prayer at Graduation*

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

may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

#### Baccalaureate Ceremonies

School officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

#### Footnotes

<sup>1</sup> The relevant portions of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech \* \* \*" U.S. Const. amend. I. The Supreme Court has held that the Fourteenth Amendment makes these provisions applicable to all levels of government—federal, state, and local—and to all types of governmental policies and activities. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>2</sup> See, e.g., *Everson*, 330 U.S. at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

<sup>3</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *accord Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

<sup>4</sup> *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating state laws directing the use of prayer in public schools); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating state laws and policies requiring public schools to begin the school day with Bible readings and prayer); *Mergens*, 496 U.S. at 252 (plurality opinion) (explaining that "a school may not itself lead or direct a religious club"). The Supreme Court has also held, however, that the study of the Bible or of religion, when presented objectively as part of a secular program of education (e.g., in history or literature classes), is consistent with the First Amendment. See *Schempp*, 374 U.S. at 225.

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

<sup>6</sup> See *Weisman*, 505 U.S. at 587.

<sup>7</sup> 505 U.S. 577 (1992).

<sup>8</sup> 530 U.S. 290 (2000).

<sup>9</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>10</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

<sup>11</sup> *Santa Fe*, 530 U.S. at 302 (explaining that "not every message" that is "authorized

by a government policy and take[s] place on government property at government-sponsored school-related events" is "the government's own").

<sup>12</sup> *Santa Fe*, 530 U.S. at 313.

<sup>13</sup> For example, the First Amendment permits public school officials to review student speeches for vulgarity, lewdness, or sexually explicit language. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–86 (1986). Without more, however, such review does not make student speech attributable to the state.

<sup>14</sup> *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Santa Fe*, 530 U.S. at 304 n.15. In addition, in circumstances where students are entitled to pray, public schools may not restrict or censor their prayers on the ground that they might be deemed "too religious" to others. The Establishment Clause prohibits state officials from making judgments about what constitutes an appropriate prayer, and from favoring or disfavoring certain types of prayers—be they "nonsectarian" and "nonproselytizing" or the opposite—over others. See *Engel v. Vitale*, 370 U.S. 421, 429–30 (1962) (explaining that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services," that "neither the power nor the prestige" of state officials may "be used to control, support or influence the kinds of prayer the American people can say," and that the state is "without power to prescribe by law any particular form of prayer"); *Weisman*, 505 U.S. at 594.

<sup>15</sup> *Santa Fe*, 530 U.S. at 302; *Mergens*, 496 U.S. at 248–50.

<sup>16</sup> *Mergens*, 496 U.S. at 250 (plurality opinion); *id.* at 260–61 (Kennedy, J., concurring in part and in judgment).

<sup>17</sup> *Rosenberger*, 515 U.S. at 845–46; *Mergens*, 496 U.S. at 248 (plurality opinion); *id.* at 260–61 (Kennedy, J., concurring in part and in judgment).

[FR Doc. 03–4693 Filed 2–27–03; 8:45 am]

BILLING CODE 4000–01–U

## ENVIRONMENTAL PROTECTION AGENCY

[OECA–2002–0015; FRL–7454–9]

### Agency Information Collection Activities: Submission of EPA ICR No. 1052.07, OMB No. 2060–0026, to OMB for Review and Approval; Comment Request

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C.

3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: NSPS Subpart D, Standards of Performance for Fossil-Fuel-Fired Steam Generating Units. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments must be submitted on or before March 31, 2003.

**ADDRESSES:** Follow the detailed instructions in the **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Dan Chadwick, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number (202) 564–7054; fax number (202) 564–0050; E-mail address [chadwick.dan@epa.gov](mailto:chadwick.dan@epa.gov).

**SUPPLEMENTARY INFORMATION:** EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 20, 2002 (67 FR 41981), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments.

EPA has established a public docket for this ICR under Docket ID No. OECA–2002–0015, which is available for public viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center is (202) 566–1514. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at <http://www.epa.gov/edocket>. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 30 days of this notice, and according to the following detailed instructions: (1) Submit your comments to EPA online using EDOCKET (our preferred method), by e-mail to [docket.oeca@epa.gov](mailto:docket.oeca@epa.gov), or by mail to EPA Docket Center, Environmental

## ATTACHMENT C

DOCUMENT RESUME

ED 387 390

SO 025 239

TITLE Religion in the Public Schools: A Joint Statement of Current Law.

INSTITUTION American Jewish Congress, New York, N.Y.

PUB DATE Apr 95

NOTE 12p.; For a related document, see SO 025 238. Reprinted by NASSP as "A Legal Memorandum" (November 1995).

PUB TYPE Viewpoints (Opinion/Position Papers, Essays, etc.) (120)

EDRS PRICE MF01/PC01 Plus Postage.

DESCRIPTORS Creationism; Dress Codes; Elementary Secondary Education; \*Laws; \*Public Schools; Released Time; \*Religion; Religious Holidays; School Prayer; \*State Church Separation; Teacher Responsibility; Teacher Rights; Values Education

IDENTIFIERS Religious Freedom

ABSTRACT

Organizations that span the ideological, religious, and political spectrum stand together as they make this a statement of consensus on current law regarding religion in public schools. Each organization professes a commitment to the freedom of religious practice and the separation of church and state that such freedom requires. The statement is devised to aid parents, educators, and students. It offers a summary of current law on school prayer, including: official participation or encouragement of religious activities; teaching about religion; student assignments and religion; the distribution of religious literature; before and after school activities; religious persuasion versus harassment; the Equal Access Act; religious holidays; excusal from religiously-objectional lessons; teaching of values; student garb; and release time. Following the text is an appendix listing contact addresses for organizations associated with this statement. (LH)

\*\*\*\*\*  
 \* Reproductions supplied by EDRS are the best that can be made \*  
 \* from the original document. \*  
 \*\*\*\*\*

## Drafting Committee

American Jewish Congress, Chair

American Civil Liberties Union

American Jewish Committee

American Muslim Council

Anti-Defamation League

Baptist Joint Committee

Christian Legal Society

General Conference of Seventh-day Adventists

National Association of Evangelicals

National Council of Churches

People for the American Way

Union of American Hebrew Congregations

## Endorsing Organizations

American Ethical Union

American Humanist Association

Americans for Religious Liberty

Americans United for Separation of Church and State

B'nai B'rith International

Christian Science Church

Church of the Brethren, Washington Office

Church of Scientology International

Evangelical Lutheran Church in America, Lutheran Office of Governmental Affairs

Federation of Reconstructionist Congregations and Havurot

Friends Committee on National Legislation

Guru Gobind Singh Foundation

Interfaith Alliance

Interfaith Impact for Justice and Peace

National Council of Jewish Women

National Jewish Community Relations Advisory Council (NJCRAC)

National Ministries, American Baptist Churches, USA

National Sikh Center

North American Council for Muslim Women

Presbyterian Church (USA)

Reorganized Church of Jesus Christ of Latter Day Saints

Unitarian Universalist Association of Congregations

United Church of Christ, Office for

ch in Society

# RELIGION IN THE PUBLIC SCHOOLS:

# A JOINT STATEMENT OF CURRENT LAW



## APRIL 1995

PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

*Mrs. [Signature]*

EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

U.S. DEPARTMENT OF EDUCATION  
Office of Educational Research and Improvement  
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.  
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OEI position or policy.

*Handwritten notes:*  
A  
O  
O  
y  
2  
2  
b

ED 387 390

## **RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW**

The Constitution permits much private religious activity in and about the public schools. Unfortunately, this aspect of constitutional law is not as well known as it should be. Some say that the Supreme Court has declared the public schools "religion-free zones" or that the law is so murky that school officials cannot know what is legally permissible. The former claim is simply wrong. And as to the latter, while there are some difficult issues, much has been settled. It is also unfortunately true that public school officials, due to their busy schedules, may not be as fully aware of this body of law as they could be. As a result, in some school districts some of these rights are not being observed.

The organizations whose names appear below span the ideological, religious and political spectrum. They nevertheless share a commitment both to the freedom of religious practice and to the separation of church and state such freedom requires. In that spirit, we offer this statement of consensus on current law as an aid to parents, educators and students.

Many of the organizations listed below are actively involved in litigation about religion in the schools. On some of the issues discussed in this summary, some of the organizations have urged the courts to reach positions different than they did. Though there are signatories on both sides which have and will press for different constitutional treatments of some of the topics discussed below, they all agree that the following is an accurate statement of what the law currently is.

### **STUDENT PRAYERS**

1. Students have the right to pray individually or in groups or to discuss their religious views with their peers so long as they are not disruptive. Because the Establishment Clause does not apply to purely private speech, students enjoy the right to read their Bibles or other scriptures, say grace before meals, pray before tests, and discuss religion with other willing student listeners. In the classroom students have the right to pray quietly except when required to be actively engaged in school activities (e.g., students may not decide to pray just as a teacher calls on them). In informal settings, such as the cafeteria or in the halls, students may pray either audibly or silently, subject to the same rules of order as apply to other speech in these locations. However, the right to engage in voluntary prayer does not include, for example, the right to have a captive audience listen or to compel other students to participate.

### GRADUATION PRAYER AND BACCALAUREATES

2. School officials may not mandate or organize prayer at graduation, nor may they organize a religious baccalaureate ceremony. If the school generally rents out its facilities to private groups, it must rent them out on the same terms, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services, provided that the school does not extend preferential treatment to the baccalaureate ceremony and the school disclaims official endorsement of the program.
3. The courts have reached conflicting conclusions under the federal Constitution on student-initiated prayer at graduation. Until the issue is authoritatively resolved, schools should ask their lawyers what rules apply in their area.

### OFFICIAL PARTICIPATION OR ENCOURAGEMENT OF RELIGIOUS ACTIVITY

4. Teachers and school administrators, when acting in those capacities, are representatives of the state, and, in those capacities, are themselves prohibited from encouraging or soliciting student religious or campus activity. Similarly, when acting in their official capacities, teachers may not engage in religious activities with their students. However, teachers may engage in private religious activity in faculty lounges.

### TEACHING ABOUT RELIGION

5. Students may be taught about religion, but public schools may not teach religion. As the U.S. Supreme Court has repeatedly said, "[i]t might well be said that one's education is not complete without a study of comparative religion, or the history of religion and its relationship to the advancement of civilization." It would be difficult to teach art, music, literature and most social studies without considering religious influences.

The history of religion, comparative religion, the Bible (or other scripture)-as-literature (either as a separate course or within some other existing course), are all permissible public school subjects. It is both permissible and desirable to teach objectively about the role of religion in the history of the United States and other countries. One can teach that the Pilgrims came to this country with a particular religious vision, that Catholics and others have been subject to persecution or that many of those participating in the abolitionist, women's suffrage and civil rights movements had religious motivations.

6. These same rules apply to the recurring controversy surrounding theories of evolution. Schools may teach about explanations of life on earth, including religious ones (such as "creationism"), in comparative religion or social studies classes. In science class, however, they may present only genuinely scientific critiques of, or evidence for, any explanation of life on earth, but not religious critiques (beliefs unverifiable by scientific methodology). Schools may not refuse to teach evolutionary theory in order to avoid giving offense to religion nor may they circumvent these rules by labeling as science an article of religious faith. Public schools must not teach as scientific fact or theory any religious doctrine, including "creationism," although any genuinely scientific evidence for or against any explanation of life may be taught. Just as they may neither advance nor inhibit any religious doctrine, teachers should not ridicule, for example, a student's religious explanation for life on earth.

#### STUDENT ASSIGNMENTS AND RELIGION

7. Students may express their religious beliefs in the form of reports, homework and artwork, and such expressions are constitutionally protected. Teachers may not reject or correct such submissions simply because they include a religious symbol or address religious themes. Likewise, teachers may not require students to modify, include or excise religious views in their assignments, if germane. These assignments should be judged by ordinary academic standards of substance, relevance, appearance and grammar.
8. Somewhat more problematic from a legal point of view are other public expressions of religious views in the classroom. Unfortunately for school officials, there are traps on either side of this issue, and it is possible that litigation will result no matter what course is taken. It is easier to describe the settled cases than to state clear rules of law. Schools must carefully steer between the claims of student speakers who assert a right to express themselves on religious subjects and the asserted rights of student listeners to be free of unwelcome religious persuasion in a public school classroom.
  - a. Religious or anti-religious remarks made in the ordinary course of classroom discussion or student presentations are permissible and constitute a protected right. If in a sex education class a student remarks that abortion should be illegal because God has prohibited it, a teacher should not silence the remark, ridicule it, rule it out of bounds or endorse it, any more than a teacher may silence a student's religiously-based comment in favor of choice.

- b. If a class assignment calls for an oral presentation on a subject of the student's choosing, and, for example, the student responds by conducting a religious service, the school has the right -- as well as the duty -- to prevent itself from being used as a church. Other students are not voluntarily in attendance and cannot be forced to become an unwilling congregation.
- c. Teachers may rule out-of-order religious remarks that are irrelevant to the subject at hand. In a discussion of Hamlet's sanity, for example, a student may not interject views on creationism.

#### DISTRIBUTION OF RELIGIOUS LITERATURE

9. Students have the right to distribute religious literature to their schoolmates, subject to those reasonable time, place, and manner or other constitutionally-acceptable restrictions imposed on the distribution of all non-school literature. Thus, a school may confine distribution of all literature to a particular table at particular times. It may not single out religious literature for burdensome regulation.
10. Outsiders may not be given access to the classroom to distribute religious or anti-religious literature. No court has yet considered whether, if all other community groups are permitted to distribute literature in common areas of public schools, religious groups must be allowed to do so on equal terms subject to reasonable time, place and manner restrictions.

#### "SEE YOU AT THE POLE"

11. Student participation in before- or after-school events, such as "see you at the pole," is permissible. School officials, acting in an official capacity, may neither discourage nor encourage participation in such an event.

#### RELIGIOUS PERSUASION VERSUS RELIGIOUS HARASSMENT

12. Students have the right to speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. But school officials should intercede to stop student religious speech if it turns into religious harassment aimed at a student or a small group of students. While it is constitutionally permissible for a student to approach another and issue an invitation to attend church, repeated invitations in the face of a request to stop constitute harassment. Where this line is to be drawn in particular cases will depend on the age of the students and other circumstances.

---

### EQUAL ACCESS ACT

13. Student religious clubs in secondary schools must be permitted to meet and to have equal access to campus media to announce their meetings, if a school receives federal funds and permits any student non-curricular club to meet during non-instructional time. This is the command of the Equal Access Act. A non-curricular club is any club not related directly to a subject taught or soon-to-be taught in the school. Although schools have the right to ban all non-curriculum clubs, they may not dodge the law's requirement by the expedient of declaring all clubs curriculum-related. On the other hand, teachers may not actively participate in club activities and "non-school persons" may not control or regularly attend club meeting.

The Act's constitutionality has been upheld by the Supreme Court, rejecting claims that the Act violates the Establishment Clause. The Act's requirements are described in more detail in *The Equal Access Act and the Public Schools: Questions and Answers on the Equal Access Act\**, a pamphlet published by a broad spectrum of religious and civil liberties groups.

### RELIGIOUS HOLIDAYS

14. Generally, public schools may teach about religious holidays, and may celebrate the secular aspects of the holiday and objectively teach about their religious aspects. They may not observe the holidays as religious events. Schools should generally excuse students who do not wish to participate in holiday events. Those interested in further details should see *Religious Holidays in the Public Schools: Questions and Answers\**, a pamphlet published by a broad spectrum of religious and civil liberties groups.

### EXCUSAL FROM RELIGIOUSLY-OBJECTIONABLE LESSONS

15. Schools enjoy substantial discretion to excuse individual students from lessons which are objectionable to that student or to his or her parent on the basis of religion. Schools can exercise that authority in ways which would defuse many conflicts over curriculum content. If it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance the school would be legally required to excuse the student.

---

**TEACHING VALUES**

16. Schools may teach civic virtues, including honesty, good citizenship, sportsmanship, courage, respect for the rights and freedoms of others, respect for persons and their property, civility, the dual virtues of moral conviction and tolerance and hard work. Subject to whatever rights of excusal exist (see ¶15 above) under the federal Constitution and state law, schools may teach sexual abstinence and contraception; whether and how schools teach these sensitive subjects is a matter of educational policy. However, these may not be taught as religious tenets. The mere fact that most, if not all, religions also teach these values does not make it unlawful to teach them.

**STUDENT GARB**

17. Religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as yarmulkes and head scarves, and they may not be forced to wear gym clothes that they regard, on religious grounds, as immodest.

**RELEASED TIME**

18. Schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on premises during the school day.

---

\* Copies may be obtained from any of the undersigned organizations.

## Appendix

### **Organizational Contacts for "Religion in the Public Schools: A Joint Statement of Current Law**

#### **American Civil Liberties Union**

Beth Orsoff, William J. Brennan Fellow  
202/544-1681 (x306)

#### **American Ethical Union**

Herbert Blinder, Director, Washington Ethical Action Office  
301/229-3759

#### **American Humanist Association**

Frederick Edwards, Executive Director  
800/743-6646

#### **American Jewish Committee**

Richard Foltin, Legislative Director/Counsel  
202/785-4200

#### **American Jewish Congress**

Marc D. Stern, Co-Director, Commission on Law and Social Action  
212/360-1545

#### **American Muslim Council**

Abdurahman M. Alamoudi, Executive Director  
202/789-2262

#### **Americans for Religious Liberty**

Edd Doerr, Executive Director  
301/598-2447

#### **Americans United for Separation of Church and State**

Steve Green, Legal Director  
202/466-3234

#### **Anti-Defamation League**

Michael Lieberman, Associate Director/Counsel, Washington Office  
202/452-8320

#### **Baptist Joint Committee**

J. Brent Walker, General Counsel  
202/544-4226

#### **B'nai B'rith**

Reva Price, Director, Political Action Network  
202/857-6645

#### **Christian Legal Society**

Steven T. McFarland, Director, Center for Law and Religious Freedom  
703/642-1070

**Christian Science Church**

Philip G. Davis, Federal Representative  
202/857-0427

**Church of the Brethren, Washington Office**

Timothy A. McElwee, Director  
202/546-3202

**Church of Scientology International**

Susan L. Taylor, Public Affairs Director, Washington Office  
202/667-6404

**Evangelical Lutheran Church in America,  
Lutheran Office for Governmental Affairs**

Kay S. Dowhower, Director  
202/783-7507

**Federation of Reconstructionist Congregations and Havurot**

Rabbi Mordechai Liebling, Executive Director  
215/887-1988

**Friends Committee on National Legislation**

Ruth Flower, Legislative Secretary/Legislative Education Secretary  
202/547-6000

**General Conference of Seventh-day Adventists**

Gary M. Ross, Congressional Liaison  
301/680-6688

**Guru Gobind Singh Foundation**

Rajwant Singh, Secretary  
301/294-7886

**Interfaith Alliance**

Jill Hanauer, Executive Director  
202/639-6370

**Interfaith Impact for Justice and Peace**

James M. Bell, Executive Director  
202/543-2800

**National Association of Evangelicals**

Forest Montgomery, Counsel, Office of Public Affairs  
202/789-1011

**National Council of Churches**

Oliver S. Thomas, Special Counsel for Religious and Civil Liberties  
615/977-9046

**National Council of Jewish Women**

Deena Margolis, Legislative Assistant  
202/296-2588

THIS PAGE INTENTIONALLY LEFT BLANK

**National Jewish Community Relations Advisory Council (NJCRAC)**

Jerome Chanes, Director, Domestic Concerns

212/684-6950

**National Ministries, American Baptist Churches, USA**

Reneè Ladue, Program Assistant, Office of Government Relations

202/544-3400

**National Sikh Center**

Chatter Saini, President

703/734-1760

**North American Council for Muslim Women**

Sharifa Alkhateeh, Vice-President

703/759-7339

**People for the American Way**

Elliot Mincberg, Legal Director

202/467-4999

**Presbyterian Church (USA)**

Eleonora Giddings Ivory, Director, Washington Office

202/543-1126

**Reorganized Church of Jesus Christ of Latter Day Saints**

W. Grant McMurray, First Presidency

816/521-3002

**Union of American Hebrew Congregations**

Rabbi David Saperstein, Director, Religious Action Center

202/387-2800

**Unitarian Universalist Association of Congregations**

Robert Alpern, Director, Washington Office

202/547-0254

**United Church of Christ, Office for Church in Society**

Patrick Conover, Acting Head of Office, Washington Office

202/543-1517

For further information, please write to:

"Religion in the Public Schools"

15 East 84th Street, Suite 501

New York, NY 10028

To receive an electronic copy of this document via e-mail,

**listproc@ajcongress.org**

with "get ajcarchive religion" in the message or gopher to

**ajcongress.org 7001**

and select "Recent Publications"