

School District Participation in Holiday Celebrations

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1. Applicable Law and General Rules:

- a. “Establishment Clause” and “Free Exercise Clause” are contained in the First Amendment to the Constitution. These clauses read:
 - i. **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.**
- b. General Rule: The guarantee of religious freedom to all means that public schools may not promote, endorse or be hostile to any religion.
- c. General Rule: Public school systems, including their employees, must remain neutral regarding religion and religious activity.
- d. Are you at risk of violation? Look to the *Lemon Test* (*Lemon v. Kurtzman*, 403 U.S. 602 (1971)): School district activity **does not** violate the Establishment Clause so long as:
 - i. It has a secular purpose;
 - ii. It does not have the principal or primary effect that either advances or inhibits religion;
 - iii. It does not foster an excessive government entanglement with religion.

2. Cases:

- a. *Bauchman v. West High School*, 132 F. 3d 542 (10th Cir. 1997): Tenth Circuit rejected a constitutional challenge brought by a Jewish student to a high school choir’s performance of songs with religious content at school concerts, some of which were held at Christian churches. Court pointed out that a number of secular songs were performed, there were religious and nonreligious settings, and music reflected community’s culture and heritage.
- b. *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009): School District, in response to parent complaints in years past, prohibited student from playing “Ave Maria” at graduation. Student sued, claiming hostility to religion under the Establishment Clause. Court found the District’s prohibition reasonable — and therefore constitutional — in light of the facts that attendance at graduation was mandatory and that there might not have been time at graduation to perform secular music as well.
- c. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 US 290 (2001): The Supreme Court held that the District’s policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause. The Court concluded that the football game prayers were public speech authorized by a government policy, they took place on government property at government-sponsored school-related events and that the District’s policy involved both perceived and actual government endorsement of the delivery of prayer at school events.
- d. *Doe v. Duncanville Independent School District*, 70 F.3d 401 (5th Cir. 1995): The Fifth Circuit found that legitimate secular reasons existed for maintaining the song “The Lord Bless and Keep You” as the Choir’s “theme song.” The court found that the song was useful to teach students to sight read and sing acapella, and did not endorse or promote religion.
- e. *Doe ex rel Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 853 (7th Cir. 2012): A school graduation ceremony was held at the local church and did not contain any religious content. The religious materials present at the building originated with the church and not the school, and it was undisputed that the district selected the church as the graduation venue for secular reasons (size, expense, location). The court concluded that holding the ceremony in the church violated the Establishment Clause. The court was particularly troubled by the presence of minors at the graduation ceremony, a “proselytizing environment” in the church, and the “sheer religiosity” of the space, including a large latin cross.
- f. *Dickman v. School Dist. No 62C*, 232 Or. 238 (1961): The issue presented was whether the expenditure of \$4000 of public funds by the school district for the purpose of furnishing textbooks

free of charge to pupils of a parochial school was constitutionally prohibited by the Oregon Constitution. The court concluded that this constitutes “a substantial benefit” to a religious institution, and as such violated Article I, § 5 of the Oregon Constitution.

3. Best Practices:

- a. **Holiday Displays:** Religious displays may be permissible under certain circumstances.
 - i. The school needs to be clear that the school is not endorsing any religion and that the purpose of the display is historical &/or cultural rather than religious.
 - ii. Displays should: be temporary, not require active participation, and reflect different and diverse religions and secular representations.
- b. **Performances:** A holiday assembly, concert or program must be presented in an objective manner.
 - i. If any religious presentations are to be included, whether represented by music, art or literature, the religious presentation should comprise a small part of the program.
 - ii. Music programs may include religious works, but they should be accompanied by musical pieces that reflect diverse cultural, ethnic and religious traditions.
 - iii. Students are not allowed to lead other students in the singing of prayers.
 - iv. Any presentation, lesson or program should emphasize the cultural aspects, rather than the religious aspects, of the holiday.
 - v. Programs, presentations and assemblies should not make a student feel excluded because of his or her religion.
- c. **Religious Venues:** Choruses are generally permitted to perform outside of the schools at various religious venues, such as churches, synagogues or temples within reason and depending on the factual circumstances.
 - i. It is important that these outside performances should not be limited to religious venues only.
 - ii. It is also important that these outside performances not be limited to one type of religious venue.
- d. **Opting Out:** Public schools should be sensitive to the student who may not want to participate or go to a presentation that is offensive to their religious sensibilities.
 - i. If a student does not wish to participate or go to such a presentation, the school should give the student an opportunity to opt out of the presentation, without any adverse effect to the student.
 - ii. This option should be presented in such a manner that the student does not feel embarrassed or pressured.
- e. **Policy:** District should consider implementing a policy affirming its practice of non-promotion and mutual respect for differing religious beliefs (OSBA sample policies IGACA and IGACA-AR).

4. Resources

OSBA’s Litigation Services Department 503-588-2800

National Alliance for Public Charter Schools, “Guidelines for Using Religious Facilities”

http://www.duanemorris.com/articles/static/scruggs_nationalalliance_2015.pdf

National Association for Music Education: “Sacred Music in Schools”:

<http://www.nafme.org/about/position-statements/sacred-music-in-schools-position-statement/sacred-music-in-schools/>

US Department of Education: Guidance on Constitutionally Protected Prayer:

<https://www2.ed.gov/policy/gen/guid/religionandschools/index.html?exp=4>