

Parent/Student Religious Activities



Recently I addressed the constitutional issues concerning the distribution of religious materials in public schools by outside groups.¹ These issues become all the more difficult when a parent or an individual student, rather than an outside group, is involved as part of a regular classroom activity. In January/February 1999, I summarized the relevant case law, which was still developing.² The following case and the accompanying question-and-answer discussion provide an update of more recent litigation.

The Case

In October 2004, Wesley B. was a kindergartner in Philadelphia's suburban Marple Newtown School District. As part of the kindergarten social studies curriculum, his teacher included a unit called "All About Me," designed for students to identify their interests and learn about those of others. She assigned one child each week to bring in a poster with pictures, drawings, or magazine cut-outs of their family, hobbies, or interests for display during the week. The teacher also asked the parents to participate by scheduling, at least seven days in advance, a day and time during the school week to share a talent, game, craft, or story with their child's class.



For Wesley's week, he and his mother made a poster that included photos of himself with his hamster, his brother, and his parents; a photo of his best friend; and a church, cut out from construction paper. His mother, an evangelical Christian, notified the school that she would come to school and read a selection from his favorite book.

Upon arriving, she told the teacher that she would be reading Psalm 118 from the King James Bible, which starts with the verse "Give thanks unto the Lord, for he is good; because his mercy endures forever." The teacher responded that she would have to check with the principal, who happened to be in a nearby hallway.

Summoning the parent, the principal explained to her that reading the Bible to the class would be against "the law ... of separation of church and state" and asked her to read from another book. She contended that the selection was no different from one in a book from the school library that her son had just finished reading—*Gershon's Monster: A Story for the Jewish New Year*—but the principal did not agree. Finally, she returned to the class and settled on a book about counting.

Beyond the "All About Me" unit, the kindergarten teacher's readings to the students included books about Christmas, Hanukkah, Kwanzaa, and Easter. In addition, one of the parents received clearance for a series of presentations, including readings from books (e.g., *A Blue's Clues Chanukah* and *The Matzah Ball Fairy*) relating to Hanukkah and Passover.

Wesley's mother filed suit in federal court, claiming various constitutional violations of her rights, including First Amendment freedom of expression.

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Questions and Answers

What do you think was the court's decision in this case?

In an unpublished decision on May 31, 2007, the federal trial court for the eastern district of Pennsylvania issued a summary judgment for the school authorities.³ Regarding the free speech claim, after acknowledging the confusion and complexity regarding the difference between appropriate cultural education and prohibited religious expression, the court first concluded that the "All About Me" unit was at most a limited public forum, subject to governmental restrictions on content. Second, the court concluded that even though the school's restriction on the parent in this case constituted viewpoint discrimination, the school authorities met the requisite justification for viewpoint discrimination in this context under

both the relaxed standard of *Hazelwood School District v. Kuhlmeier* and the otherwise applicable compelling-interest standard.

Under *Hazelwood*, the court found that young children would have perceived the planned presentation as school-endorsed, and that the school's intent to avoid endorsing proselytizing speech to this captive audience was a legitimate pedagogical concern. The court also concluded that the avoidance of a First Amendment establishment clause violation in this specific context was a compelling interest.

Addressing the parent's establishment clause claim, the court concluded that the school's actions constituted religious neutrality, not promotion or inhibition of religion. Citing school policy that allowed religious symbols and discussion within reasonable, nonproselytizing limits, the court commented that Wesley's parents could have appropriately responded by "tell[ing] the other students about her time with Wesley reading the Bible or the role of religion in their family life."

Finally, addressing the parent's equal protection clause claim, the court pointed out that other holiday presentations did not promote a religious viewpoint because they constituted part of the children's education on various religions and cultures. The distinction, the court explained, is "subtle [but] ... all-important."

Did this court recognize the difficulties faced by public school officials in such situations?

Yes. Acknowledging the "fact-intensive nature of each inquiry and the somewhat confounding treatment of these questions by the courts," the judge noted "this area will remain confusing and will always require an individualized approach." Providing more specific advice for making the "difficult distinctions between permissible cultural or religious expression and impermissible religious promotion," the judge specified the following factors for consideration by public school educators:

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- The identity of the speaker;
- The context of the speech;
- The age of the listeners; and
- The way in which the religious content is delivered and likely to be heard.

What have been other recent decisions concerning this issue?

As this court recognized, other decisions have been less than consistent. For example, in a similar case that was included at its earlier stage in the January/February 1999 article,⁴ the 3rd Circuit Court of Appeals—which covers Delaware, New Jersey, and Pennsylvania—initially affirmed, then vacated, and finally reaffirmed on a divided vote a decision in favor of the district.⁵ More recently, a federal district court in New York ruled in favor of the plaintiff-student who, in the fourth grade, sought to distribute religious tracts to her friends during lunch or recess.⁶

If the disputed religious expression in this case had been part of a classroom holiday celebration, would the judicial outcome have been different?

Not necessarily, because a court would likely consider the classroom event within the curriculum, at least in the *Hazelwood* sense of school sponsorship. Unless other factors identified by the court, such as the age of the students, differed significantly, the outcome likely would be the same. For

example, in the second of the 3rd Circuit cases cited in the earlier article, the appellate court upheld the constitutionality of a public school decision to prevent a child, first as a pre-kindergartner and subsequently as a kindergartner, from distributing religious-themed gifts at a schoolwide, classroom-based holiday party.⁷

However, the court itself is a significant factor in such cases. For example, the 2nd Circuit Court of Appeals, which covers Connecticut, New York, and Vermont, denied a district's motion for summary judgment, thus preserving for trial a case where a kindergarten student brought a religious poster to display at a school environmental assembly in response to a save-the-world poster assignment.⁸

If the instance of religious expression in this case had been outside of the classroom and after school hours, would the outcome have been different?

More than likely, depending on the other factors as well. For example, a federal district court in New Jersey recently ruled in favor of a student who sought to sing a religious song during an after-school talent show at an elementary school.⁹ Similarly, a federal district court in Michigan granted summary judgment to a fifth grader who based his multidisciplinary project assignment on candy canes with a religious message.¹⁰ However, the court also ruled in this case that the principal was covered by qualified immunity, given the unsettled state of the applicable case law.

Conclusion

The case law concerning the constitutional boundaries for parent or student religious expression or activities in elementary schools continues to develop, but the area is still not clearly settled. The question remains about how to distinguish between instruction about religion and promotion of religion. Given that this question is among "the thorniest of constitutional thickets,"¹¹ the key is to be very careful, considering the specific circumstances, including the

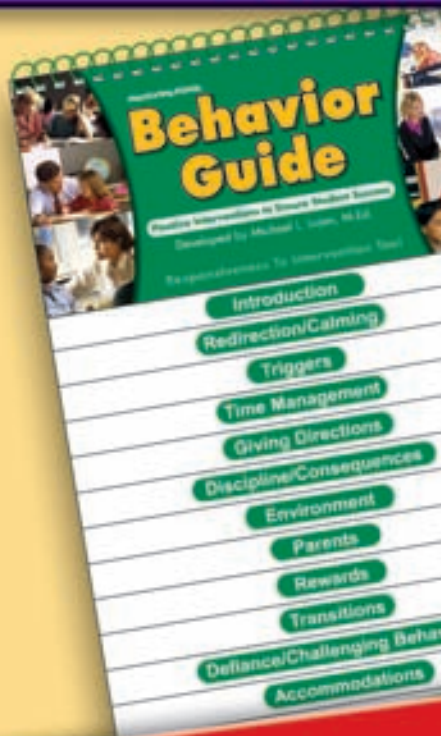


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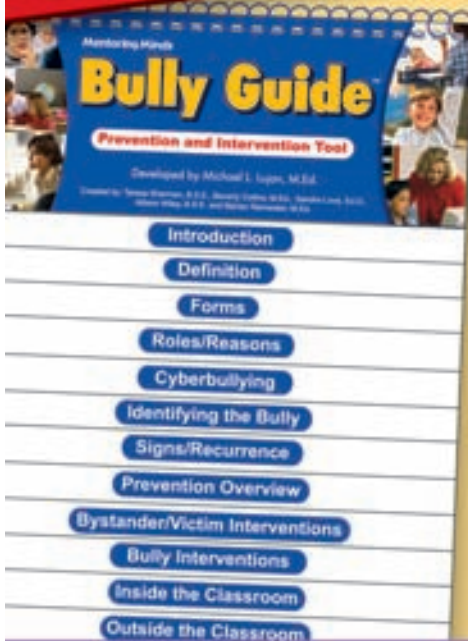
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wording and previous application of pertinent policy, the identity of the speaker (e.g., parent or student), the context of the activity (e.g., classroom or after-school event), the grade level of the students (e.g., K-1 or 5-6), and the manner of delivery (e.g., reasonably perceived as school-endorsed or not). Consultation with legal counsel is particularly advisable, given the jurisdictional differences and the fluid nature of the Supreme Court on issues of not only religion but also of expression.¹²

Notes

1. Zirkel, P. (2007, September/October). Distribution of religious materials. *Principal*, 12-14. This article also included, as a secondary matter, case law concerning student distribution of such literature.
2. Zirkel, P. (1999, January/February). Student evangelism. *Principal*, 62-63. For the secular counterpart, see Zirkel, P. (2003, September/October). Freedom of expression in elementary school. *Principal*, 10-12. For the teacher counterpart, see Zirkel, P. (2006, January/February). Teacher evangelism: An update. *Principal*, 10-11.
3. *Busch v. Marple Newtown Sch. Dist.*, 2007 WL 1589507 (E.D. Pa. 2007).
4. See *supra* note 2.
5. *C.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997), *aff'd*, 195 F.3d 167 (3d Cir. 1999), *vacated and reh'g en banc granted*, 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court*, 226 F.3d 198 (3d Cir. 2000).
6. *M.B. v. Liverpool Cent. Sch. Dist.*, 487 :F. Supp. 2d 117 (N.D.N.Y. 2007).
7. *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003).
8. *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir 2005), *cert. denied*, 547 U.S. 1097 (2006).
9. *O.T. v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369 (D.N.J. 2006).
10. *Curry v. Sch. Dist. of Saginaw*, 452 F. Supp. 2d 723 (E.D. Mich. 2006).
11. *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d at 620.
12. The Supreme Court recently issued a student expression decision that added to *Hazelwood* and included dicta about religious expression. *Frederick v. Morse*, 127 S. Ct. 2618 (2007). For a concise analysis, see Zirkel, P. (2007). The Supreme Court speaks on student expression: A revised map. *West's Education Law Reporter*, 221, 485-491.

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