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California Three Rs

Rights, Responsibility, and Respect

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Teacher Speech and the First Amendment in Public Schools

Margaret Hill, Director, California Three Rs Project

The opening paragraph of the First Amendment Center's consensus document *Teacher's Guide to Religion and Public Schools* reads:

Each day millions of parents from diverse religious backgrounds entrust the education of their children to the teachers in our nation's public schools. For this reason, teachers need to be fully informed about the constitutional and educational principles for understanding the role of religion in public education.

What is the critical constitutional issue? Schools, as government institutions, come under the establishment clause of the First Amendment. Though there is disagreement among legal experts over the meaning of "establishment" most of the modern Supreme Court decisions have argued that the clause prohibits government from promoting religion in general as well as preferring one religion over another.

Most educators now know that eliminating discussion of religion from the curriculum was not the intention of the Court when they restricted school sponsored prayer and religious activity such as Bible reading in the 1960s as a violation of the establishment clause. In fact, in justice Tom Clark's words, "It 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."

In fact since religion has had and continues to exert a significant role in history and society, it is critical to learn about religious beliefs, symbols, and practices in order to understand the history, literature, art, and values in the nation and the world. The critical word in the above sentence is **about**. The role of the public school, and the teacher as its representative, is to sponsor *study about* religion, *not practice* religion; *expose* students to a diversity of religious views but *not impose* any particular view; *educate about* religions but *not promote or denigrate* any religion, religion in general, or non belief.

In concrete terms of educational practice, this means that class discussions, instructional materials, and bulletin board postings related to religion must be neutral and free of advocacy on the part of the teacher. The courts have been clear that teachers, as representatives of the state, do not have the right to practice their religion in the presence of students during the school day. Of course, like any other Americans, teachers are permitted to engage in religious activities on their own time, alone or with other teachers at the school when students are not present. Personal beliefs of teachers have sometimes led them to step over the line toward advocacy for their beliefs or for religion in general in their interactions with students. This has resulted in needless and costly lawsuits.

A recently adjudicated case that applies directly to California schools and teachers clarifies the court's reasoning as it relates to the establishment clause. The case is *Johnson v Poway USD*, No. 10-55445 decided by the 9th Circuit Court of Appeals on September 13, 2011, that reversed a lower court decision, and reinforced the idea that teachers represent and speak for government in their role as public school educators in contact with students required to attend. The 9th Circuit Appellate Court used the 1968 *Pickering v. Board of Education of Township High School District 205, Will County No. 510* case in its decision. They used this as precedent "Because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers necessarily act as teachers for the purpose of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official." Instead, teachers are not speaking as citizens when they are speaking directly in lectures or class discussions, or indirectly through bulletin board postings, etc. to fulfill a responsibility of their job. They are doing these actions as school officials with establishment clause limitations on religious speech.

The specific case had to do with Bradley Johnson, a Poway USD math teacher who posted two banners in his classroom for a long period of time, one with the phrases "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace On Thee," and the other with the phrase "All Men Are Created Equal, They Are Endowed By Their CREATOR." Even though other teachers posted personal things on their classroom walls, the school board directed the principal to ask Mr. Johnson to remove the banners, arguing that the speech attributable to the display was government speech. The Appellate Court panel argued that the [principal's] "action taken to avoid conflict with the Establishment Clause and maintain the very neutrality the Clause requires neither has a primary effect of advancing or inhibiting religion nor excessively entangles government with religion."

The panel's thinking in this case was made explicit in the opening sentence of the opinion: "We consider whether a public school district infringes the First Amendment liberties of one of its teachers when it orders him not to use his public position as a pulpit from which to preach his own views on the role of God in our Nation's history to the captive students in his mathematics classroom. The answer is clear: it does not."

What does this mean for schools in California? Schools and teachers need to remember that what they say, what they write, and what they display matters in that it represents their roles as government officials, and subject to the constitutional limits of the establishment clause. By selecting and displaying historical documents representing only a religious viewpoint, they need to consider the effect that it appears to promote religion, not history. It is wise to go back to the oft published 3Rs list of parameters for maintaining religious neutrality by determining the purpose of any teacher or school speech. Appropriate speech fulfills the role of the public school and the teacher as its representative...

- to sponsor study about religion, not practice religion
- to expose students to a diversity of religious [and non religious] views but not impose any particular view
- to educate about religions but not promote or denigrate any religion, religion in general, or non belief

The *Johnson v Poway* decision makes clear that material posted on classroom walls not related to the curriculum may well be open to challenges. For example, posting the 10 Commandments on the classroom wall all year would be subject to question based on establishment grounds where posting the 10 Commandments, Hammurabi's Code and the Twelve Tables of Roman Law in a 6th grade classroom where they are studied and compared would raise nary an eyebrow. Studying the historical context in which the American motto "In God We Trust" was approved by Congress is a valuable inclusion in the curriculum that would certainly satisfy the secular purpose test for establishment challenges. Keeping our purpose in mind is all that it takes to make school welcoming and respectful places for all of our students to grow and learn and where parents of all religious and non religious persuasions will entrust their children to our care without regret.

Sources: *Finding Common Ground: A First Amendment Guide to Religion and Public Schools* by Charles Haynes and Oliver Thomas; *Legal Clips – National School Boards Association* <http://legalclips.nsba.org/>, September 15, 2011

Resources for Dealing with Upcoming Religious Holidays in Public Schools

Teaching About the Jewish High Holy Days - Rosh Hashanah and Yom Kippur

<http://ca3rsproject.org/pdfs/Teaching Jewish High Holy Days 2011.pdf>

It is a sign of America's growing sensitivity to religious diversity that many school calendars now include the Jewish High Holy days of Rosh Hashanah and Yom Kippur. These major religious holidays directly involve many Jewish students and teachers in our schools. This year Rosh Hashanah, or the Jewish New Year, begins at sundown on September 28. It is celebrated by most American Reform Jews through September 29 and marks the beginning of 5772 on the Jewish calendar. Jews of other traditions exercise an extra day of observance for Rosh Hashanah and hold the days between Rosh Hashanah and Yom Kippur as sacred days of introspection. Yom Kippur, or Day of Atonement, begins at sundown on October 7 and lasts through October 8. Rosh Hashanah and Yom Kippur are major holidays for Jews. For resources and lessons, go to the above pdf file at the CA 3Rs Project website.



Teaching About Day of the Dead or *Día De Los Muertos*

<http://ca3rsproject.org/bulletins/Day of the Dead-Religious Holidays.pdf>

The culture and history of Day of the Dead provide an incredibly rich opportunity for learning but, as institutions representing government, schools must remember the religious elements of the holiday so that they do not infringe on the constitutional rights of their students and their families. Teachers must be careful not to cross the line between teaching about religious holidays (which is permitted) and celebrating religious holidays (which is not). Teaching about a religious holiday is constitutional if it furthers a genuine secular program of education, is presented objectively, and does not have the effect of advancing religion through simulating or participating in a sacred ritual or practice. To avoid the appearance of sacred practice, selecting public school appropriate resources and lesson activities is crucial. While having students create and decorate altars clearly crosses the line (an activity in many popular lessons), learning about the sacred traditions does not. To find out more go to the pdf file listed above at the CA 3Rs Project website.



Halloween

You will also find information on how to make the Halloween season something that all students can both learn about and have fun. Find lessons and activities at <http://ca3rsproject.org/pages/calendar.html>. Scroll down to *Halloween in Public Schools*.

Common Ground Resources:

Finding Common Ground: A Guide to Religious Liberty in Public Schools by Charles C. Haynes and Oliver Thomas. First Amendment Center, 2007.

This book has guidelines on how to handle a wide range of issues related to religious liberty and public schools.

First Amendment Center: Religious Liberty http://www.firstamendmentcenter.org/rel_liberty/index.aspx

This is an up-to-the-minute resource with current issues and court cases. A PDF version of *Finding Common Ground* is available here.

For California Three Rs program information, contact...

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For First Amendment religious liberty information, contact...

Dr. Charles C. Haynes, Senior Scholar, Freedom Forum First Amendment Center, 555 Pennsylvania Ave. NW, Washington D.C. 20001 Tel: 202/292-6293 chaynes@freedomforum.org

For information on teaching about world religions, contact...

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