

Religious Freedom in the Public Schools: Three Doors of Opportunity Already Open to You

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Many Christians have come to believe that the doors of opportunity for religious freedom in the public schools are all shut tight. But this is a mistake. This article highlights three doors of opportunity for religious freedom in the public school that are well-established in the law. This article is not about what most Christians would like the law to be (that's for another article); it is about what the law already is and what we should do about it.

How Important Is the Public School Mission Field?

Christians committed to the gospel can ill afford to neglect public schools, where millions of children from countless races and backgrounds reside whose exposure to the gospel is often non-existent. Despite the strength of the Christian school and home school movements, almost 90% of the nation's youth still attend public schools.¹ According to at least one survey, from a statistical standpoint, almost 90% of Christians indicate that they came to know Christ as Savior before age 18 and only a very small percentage after that age.² While God can save anyone at any age, these statistics nonetheless highlight the importance of reaching public school students during their impressionable school years regardless of whether your children attend these schools. This is especially true given many doors of opportunity currently available to reach public school students.

Door #1: Released Time Instruction

Released time religious instruction occurs when public schools, with the parents' permission, release students during the school day to attend religious instruction classes off-school grounds, often at a local church. This is sadly one of the most significant and neglected doors of opportunity to reach public school students with the Gospel.

The legality of off-campus released time religious instruction was established by the U.S. Supreme Court over 50 years ago.³ Many states expressly authorize released time classes. Most states authorize the classes up to a certain number of hours per week.⁴ In most states, released time classes are optional—it is often left up to the local school officials to decide whether they will be allowed.⁵ This puts an obvious premium on maintaining a good on-going cooperative relationship with local school officials.

In a few states (including Florida, Michigan, North Dakota, Hawaii, Oregon and Pennsylvania), the public schools are legally required to release students for released time classes as long as the appropriate parental permission is provided.⁶ Many states (at least 19 beyond the 6 listed above) expressly authorize religious released time classes but leave it up to the discretion of local officials whether to allow them.⁷ In the approximately 25 states which have no specific

law regarding released time classes, it is fair to conclude that off-campus released time classes are permitted under the U.S. Supreme Court's decisions, subject to the discretion of the state and local educational officials.⁸

A huge advantage of released time classes is that the content of the classes is controlled entirely by the sponsoring church or religious organization. The government has no control whatsoever over what is taught, giving the sponsor complete freedom to teach the Word of God. Many organizations and churches are reaching hundreds of students, many of whom may never otherwise hear the gospel or darken the doors of a local church. And these students can be disciplined and taught through the local church, while also staying in their school and household—to which they can be a gospel light.

Door #2: Distribution of Material in Public Schools

Many Christians underestimate the rights of Christians to hand out flyers or other materials. In the last few years, almost every high-level federal court addressing this issue has ruled that the public schools may lawfully hand out religious literature on behalf of religious community groups on the same equal access basis as private secular community group literature.⁹

In fact, federal courts have made it quite clear that if a public school hands out flyers for private secular community groups, it is constitutionally required to hand out flyers for religious community groups.¹⁰ One court has concluded that a school could not hand out literature that on its face attempted to convert the reader to a particular religious belief.¹¹ However, this decision is binding in only some western states and would still allow a church to distribute through the schools a flyer inviting the reader to come to a church-sponsored event as long as the flyer itself did not contain a proselytizing message.¹²

Public schools are not legally required to hand out literature for any private community groups. Some schools don't, but most do. If they do, as a general rule, they can no longer exclude the most common invitations to attend church-sponsored events.

The ability for churches to communicate directly with public school students can make a dramatic difference. Recently, after becoming aware of the case law described above, one local school nearby reversed its policy and began allowing a local church to distribute flyers announcing their released time classes. The number of kids jumped from 45 to 85 within two months. Another church saw a similar increase, going from 30 to 74 kids.

Likewise, courts have repeatedly upheld the right of students to distribute religious literature to fellow students during non-instructional time.¹³ In 1998, the U.S. Department of Education issued the following guidelines about student religious distribution:

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.¹⁴

Door #3: Student Religious Expression

Public school students have far more religious freedom than most Christians realize. Here are a few examples.

Student Religious Meetings

Under a federal law known as the Equal Access Act, if a public high school allows any other non-curriculum related student groups to meet during non-instructional time, it must also allow student religious groups to meet on the same basis.¹⁵ “Non-instructional time” means at least the time before and after school and during lunch time.¹⁶ It may also include other times during the school day when extra-curricular-related student groups are permitted to meet during a seminar period or student activity period.¹⁷

Most public high schools allow non-curricular related student groups to meet on school grounds thereby triggering the right for Christian student groups to meet. For example, the U.S. Supreme Court has found such groups as Chess Clubs to be non-curricular-related under particular circumstances.¹⁸

Christian student groups must be given the same opportunities to advertise their meetings as other groups. In the leading case, the U.S. Supreme Court ruled in 1990 that access rights for student religious groups included the right to advertise in the school newspaper, on the school bulletin board, in the annual Club Fair and even on the school’s public address system.¹⁹ A recent case suggests that even public school teachers are entitled to actively participate in after-school student religious meetings even if they take place at the same building where they teach.²⁰

After-School Student Religious Meetings **(Conducted by Private Religious Groups)**

In 2001, the U.S. Supreme Court ruled that it was lawful for elementary school students to meet on school grounds after school for religious meetings conducted by a private religious group.²¹

In the wake of the 2001 U.S. Supreme Court ruling, nationwide ministries like CEF (Child Evangelism Fellowship) have seen explosive growth in their after-school Good News Club meetings in public schools. These CEF meetings, which teach the Bible to children, have increased from 17,000 students attending before the 2001 court decision to over 150,000 students attending in 2013.

Student-to-Student Evangelism

Student-to-student evangelism in the public school is protected for the same reasons described above concerning student-to-student literature distribution. In 1998, the U.S. Department of Education issued the following guidelines concerning student religious discussions:

Students . . . have the same right to engage in . . . 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. . . .

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.²²

It should be clear that Christian students possess considerable freedom for religious expression in the public school.

Other Doors of Opportunity

Other doors of opportunity for religious freedom in the public schools include religious topics in the curriculum, religious holidays and religious music in the curriculum, religious topics in student assignments, mealtime prayers, some teacher rights, and after-hours use of school buildings by religious community groups.

Will You Use the Open Doors?

When it comes to God's evaluation of believers, "to whom much is given... much is required."²³ Have you been a good steward of the great religious freedom God has so graciously bestowed upon us in this country? Is there any reason for you or your local church not to take advantage of the open doors of opportunity to reach public school children with the Gospel?

A Word about Christians Invoking Legal Rights

Christians would do well to be "wise as serpents" and "harmless as doves" when invoking their legal rights with school officials.²⁴ School officials are often unaware of recent developments with laws concerning religious freedom. Christians communicating their legal rights should do so gently, intelligently, and usually in private. School officials often respond

positively, especially when they learn that they are on solid legal ground in allowing greater religious freedom. If possible, follow the school's chain of command so that you allow lower-level officials the dignity of changing their position without the need to be called on the carpet by one of their superiors. Remember, there is Scriptural precedent for Christians politely asking public officials to follow the law, especially when it will result in more breathing room for the Gospel. For example, when the Apostle Paul faced an imminent scourging, he stopped it by simply asking the soldier, "Is it lawful to scourge a Roman?"²⁵ (The Apostle Paul knew the answer in his situation was "no" and so apparently did the soldier.) You can substitute your own question: "Is it lawful for you, a public school official, to refuse to hand out our church's literature when you hand it out for private secular community groups?" When properly informed of the law, I have seen countless public schools agree to distribute Christian materials concerning religious events.

About The Author

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Disclaimer: This article is intended to be educational in nature and not legal advice; readers should consult an attorney in their state if they have specific legal questions. If readers need to locate an attorney in their state who is knowledgeable in this area of law, Tim or the Alliance Defending Freedom can help.

¹ Digest of Education Statistics, 2012; See U.S. Department of Education, National Center for Education Statistics, The NCES Common Core of Data (CCD), "State Nonfiscal Survey of Public Elementary/Secondary Education," 1988-89 through 2001-2002, and Projections of Education Statistics to 2013; and U.S. Department of Education, NCES, "Characteristics of Private Schools in the United States: Results from the 2001-2002 Private School Universe Survey," Stephen P. Broughman and Kathleen W. Pugh (October 2004).

² Based on an article by Barna Research Group from November 15, 1999.

³ Zorach v Clauson, 343 US 306 (1952); The continued validity of the Zorach case has been recognized by another high-level federal court as recently as August, 2004. Pierce v Sullivan West Central School District, 379 F3d 56 (2nd Cir, 2004). Unfortunately, the US Supreme Court held in 1948 that on-campus released time classes are unconstitutional. McCollum v Board of Education, 333 US 203 (1948).

⁴ See Footnote 5.

⁵ Arizona: Ariz. Rev. Stat. § 15-806 (authorized but leaves it to local school board to adopt policy). California: Cal. Educ. Code § 46014 (up to 4 hours per month). Florida: Fla. Stat. § 1003.21(2)(b), (local school boards required to adopt policies to authorize released time). Hawaii: Haw. Rev. Stat. § 302A-1139 (Hawaii mandates the school to release students for up to 1 hour per week at a time the school board designates). Idaho: Idaho Code Ann. § 33-519 (up to 5 class periods per week, not exceeding 165 per school year). Indiana: Ind. Code § 20-33-2-19 (the principal, subject to superintendent review, specifies the amount of time given, not exceeding 2 hours per week). Iowa: Iowa Code & 299.2(3) (attending religious service or receiving religious instruction cannot be counted as an absence). Kentucky: KRS & 158.220 (the board of education shall allow an hour a week for moral instruction in accordance with religious faith). Maine: ME. REV. Stat. Ann. tit. 20, § 1224-A (the local school may release students for an hour a week for release time). Massachusetts: Mass. Gen. Laws, ch. 76, § 1 (authorizes release time; leaves up to

local school councils to establish rules; not to exceed 1 hour per week). Michigan: Mich. Comp. Laws § 380.1561(3)(d) (up to 2 hours per week); Accompanying state regulations indicate that if the school is provided with appropriate parental permission slips, the school *must* release students for religious released time classes. Mich. Admin. Code r. 340.71. Minnesota: Minn. Stat. § 120A.22, subdiv. 12(3) (School board may allow up to 3 hours per week). Montana: Mont. Code Ann. § 20-1-308 (trustee of school district determines the amount of time student may be released). New Mexico: N.M. Stat. § 22-12-3 (subject to the approval of the principal, the student may be excused for release time, not exceeding 1 class period per day). New York: N.Y. Educ. Law § 3210(2)(b); N.Y. Comp. Codes R. & Regs. tit. 8, § 109.2 (local school board may allow release up to 1 hour per week). North Dakota: N.D. Cent. Code § 15.1-19-04 (the principal *must* allow release time up to 1 hour per week). Ohio: Ohio Rev. Code Ann. § 3321.04(c) (local board of education may prescribe the authority and manner which a child may be excused; there is no express statutory provision either permitting or prohibiting religious release time); Ohio Attorney General Opinion No. 88-001, 1988 WL 428789 (1988) (it is lawful for Ohio public schools to authorize release of public school students to attend off-site released time religious instruction classes); but see Moore v. Board of Education, 4 Ohio Misc. 257, 212 N.E.2d 833 (1965) (even if the religious instruction is off school property, the instruction cannot be sponsored or taught by the school). Oregon: Or. Rev. Stat. § 339.420 (students may be released up to 2 hours per week for elementary students and up to 5 hours per week for secondary students); Dilger v. School District 24 CJ, 222 Or. 108, 117, 352 P.2d 564 (1960) (the school district *must* allow release time but the school district may determine the time and days of release). Pennsylvania: Pa. Stat. Ann. tit. 24 § 15-1546 (the superintendent *must* release students up to 36 hours per school year). South Carolina: S.C. Code Ann. § 59-1-460 (school district board of trustees may adopt a policy that allows for released time). SC Code Ann. § 59-39-112 (Students may receive elective hours for released time classes). South Dakota: S.D. Codified Laws § 13-33-10 (1 hour per week). Utah: U.A.C. R277-610-3 (schools must release students for release time class). U.A.C. R277-610-4 (students may receive elective credits for release time class). Vermont: Vt. Stat. Ann. tit. 16, § 1051-55 (states policy is to allow released time and school board has a duty to cooperate). West Virginia: W. Va. Code § 18-8-1, Exemption J (local boards can establish rules to implement it). Wisconsin: WIS. Stat. § 118.155 (schools must permit students to be absent “at least 60 minutes but not more than 180 minutes per week to obtain religious instruction outside the school during the required school period”).

⁶ Fla Stat Section 1003.21(2)(b); MCL 380.1561(3)(d); Mich Admin. Code 340.71; ND Cent Code Section 15.1-19-04; Or Rev Stat Sect 339.420; see also Dilger v School Dist, 352 P2d 564 (1960); Pa Stat Ann tit. 24 Sect 15-1546.

⁷ See Footnote 5.

⁸ The 25 states with no specific released time laws are as follows: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington, Wyoming.

⁹ Rusk v Crestview Local School District, 379 F3d 418 (6th Cir, 2004) (upholding legality of school distribution of private religious group literature to elementary school students); Hills v Scottsdale Unified School District, 329 F3d 1044 (9th Cir, 2003) cert den 124 S Ct 1146 (2004); Sherman v Comm. Consol. School District, 8 F 3d 1160 (7th Cir, 1993) cert den 114 S Ct 2109 (1994) (upholding school policy allowing on-campus distribution of Boy Scouts literature); Child Evangelism Fellowship of Md. Inc v Montgomery County Public Schools, 373 F 3d 589 (4th Cir, 2004); Child Evangelism Fellowship of New Jersey, Inc. v Stafford Township School District, 386 F 3d 514 (3rd Cir, 2004); But see Peck v Upshur County Board of Education, 155 F3d 274 (4th Cir, 1998) (upholding school policy allowing distribution of Bibles and other religious materials by religious groups on school grounds on limited basis, but finding it unconstitutional at elementary schools).

¹⁰ Hills, supra; Montgomery County Public Schools, supra; Stafford Township, supra; but see Peck v Upshur County Board of Education, 155 F3d 274 (4th Cir, 1998) (upholding school policy allowing distribution of Bibles and other religious materials by religious groups on school grounds on limited basis, but finding it unconstitutional at elementary schools.)

¹¹ Hills, supra.

¹² See cases in footnote 10 above.

¹³ Morgan v Swanson, 659 F 3d 359 (5th Cir, 2011) (en banc) cert den 132 S Ct 2740 (2012) (school policy restricting student-to-student religious literature distribution struck down as unconstitutional); J.S. v Holly Area School District, 749 F Supp 2d 614, 623 (E.D., Mich. 2010) (“blanket prohibition upon a student’s distribution of

materials on the basis of religious viewpoint is not constitutionally permissible”); M.B. v Liverpool Central School Dist., 487 F Supp 2d 117 (N.D. NY, 2007) (school district violated student’s First Amendment rights when it prohibited her from distributing a religious flyer to her classmates during noninstructional time); Hedges v Wauconda Community Unit School District, 9 F3d 1295 (7th Cir, 1993) (total ban on student religious literature distribution at junior high school found unconstitutional); Westfield High School LIFE Club v City of Westfield, 249 F Supp 2d 98 (D. Mass, 2003) (ruling ban on religious literature distribution outside of class was unlawful); Johnston-Loehner v O’Brien, 859 F Supp 575 (MD Fla, 1994); Nelson v Moline School Dist., 725 F Supp 965 (CD Illin, 1989); Clark v Dallas Independent School Dist., 806 F Supp 116 (ND Tex, 1992); Slotterback v Interboro School Dist., 766 F Supp 280 (ED Pa, 1991) (upholding right of students to distribute religious tracts and striking down school policy banning materials that proselytized a particular belief); Thompson v Waynesboro Area School Dist., 673 F Supp 1379 (MD Pa, 1987).

¹⁴ Child Evangelism Fellowship, P.O. Box 348, Warrenton, MO 63383; (636) 456-4321; www.cefonline.com.

¹⁵ Federal Equal Access Act, USC Section 4071 to 4074. See also Board of Education v Mergens, 496 US 226 (1990).

¹⁶ Federal Equal Access Act, 20 USC 4071 to 4074; Ceniceros v Board of Trustees, 106 F 3d 878 (9th Cir, 1997).

¹⁷ Pearce v Northville Public School, case no. 00-CV-75174-DT (ED Mich, 2000) (copy on file with author) (consent judgment requiring school to allow extracurricular religious group to meet in school room during school day during Seminar Period on the same basis as other non-religious extracurricular student groups); Donovan v Punxsatawney Area School Bd., 336 F3d 211 (3rd Cir, 2003) (student activity period); Prince v Jacoby, 303 F3d 1074 (9th Cir, 2002) (student/staff period during the school day).

¹⁸ Mergens, 496 US 226 (1990).

¹⁹ Mergens, supra.

²⁰ Wigg v Sioux Falls School District, 382 F3d 807 (8th Cir, 2004).

²¹ Good News Clubs v Milford Central School, 533 US 98, 121 S Ct 2093, 150 LEd 2d 151 (2001).

²² Finding Common Ground: A Guide to Religious Liberty in Public Schools, Student Religious Expression in Public Schools: United States Department of Education Guidelines, Revised May 1998.

²³ Luke 12:48.

²⁴ In Matthew 10:16, Jesus says “Behold, I send you forth as sheep in the midst of wolves, be ye therefore wise as serpents, and harmless as doves.”

²⁵ See Acts 22:24-29.