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POLICY SERVICES ADVISORY

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Policy Advisory Discussion

Some of the following is merely informational, and could be conveyed in a Policy Alert, but because the policy service is making minor changes to master policies based on it, it is issued as a Policy Advisory.[1]

Since at least 2002, federal law requires the U.S. Department of Education (ED) to issue guidance every two years on the current state of the law concerning constitutionally protected prayer in public elementary and secondary schools (20 U.S.C. § 7904[2]). The law also requires school districts, as a condition for the receipt of federal funds, to annually certify that no policy prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, as detailed in the Ed Guidance. The law authorizes and directs ED to enforce compliance.

The principal legal challenge for school districts is distinguishing between protected private religious expression by school employees and unconstitutional government endorsement or promotion of religion through those employees. Three U.S. Constitutional clauses are at issue when it comes to school prayer, all of them contained in the First Amendment:[3]

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[1] "Policy Advisories" inform school boards of changes to the NMSBA master policy manual. "Policy Alerts" are used periodically by the NMSBA policy service to convey information that does not result in changes to the master policy manual.

[2] https://www.law.cornell.edu/uscode/text/20/7904

[3] And made applicable to states and other governmental entities, like school districts, through the 14th

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- **Free Speech Clause**: Protects the right to express ideas and opinions without unjustified government restriction. This would include student or employee prayer, together or alone, subject to reasonable time, place, or manner restrictions; for example, a student does not have a Free Speech right to loudly talk over a teacher trying to teach math in class. Public employees generally are not protected by the First Amendment when speaking pursuant to their official job duties.
- **Establishment Clause**: Prohibits governments from establishing a state religion, sponsoring religious activity, compelling a religious practice, or favoring/disfavoring religion. Essentially, public schools must remain neutral to religion, neither favoring nor disfavoring any religion, or religion over nonreligion. Recent Supreme Court decisions have placed greater emphasis on governmental neutrality toward religion and equal treatment of religious expression than earlier decisions that focused more heavily on avoiding any appearance of governmental endorsement of religion.
- **Free Exercise Clause**: Protects the right to hold and practice religious beliefs—including prayer—without unjustified government interference.

Courts interpret these constitutional provisions in the context of lawsuits brought by people who believe their rights have been violated by a government entity (e.g., a school district). Neither students nor teachers "shed their constitutional rights… at the schoolhouse gate," but the rules apply differently in a public school context and the outcomes depend on the particular circumstances of each case. When an appeals court determines what the constitution means in the context of a particular case, that interpretation becomes the law in that jurisdiction for similar cases. When the U.S. Supreme Court makes that determination, its interpretation becomes the law nationwide. Thus, the law is always evolving. Knowing where the line will be drawn is difficult, not just for courts, but especially for school officials in the trenches tasked with the job of educating all-comers while complying with all laws. This is especially so when the Supreme Court itself has changed the way it evaluates these cases over the years.

A brief example to illustrate the nuance: We know that a school district violates the Establishment Clause by broadcasting a prayer over the PA system at a football game.[4] We also know that in a different case, under the facts before the Supreme Court, it did not violate the Establishment Clause for a coach to engage in an audible, brief, personal post-game prayer on the field—even while still on duty but during a time when other coaches were allowed to attend to personal matters and even if voluntarily joined by players and others—and that the coach had Free Speech and Free Exercise rights to do so.[5] What is less clear is how the Supreme Court, using its current approach, would decide the outcome if the coach said his audible prayer on the bus ride home or at a mandatory team meeting (to a captive audience), or if there was evidence that the coach gave more playing time to students who joined in the prayer at the expense of those who did not.

Amendment.

[4] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000).

[5] Kennedy v. Bremerton School District, 597 U.S. 507 (2022)

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These issues, of course, can be politically contentious and whenever a new administration takes control of ED, it naturally tends to give greater emphasis to its own values more than competing values, while still (generally) trying to stay faithful to the law.

ED published its most recent guidance in February 2026. Though it does not announce any ground-breaking changes to the "current state of the law," related to school prayer,[6] or differ drastically in its discussion of the law from prior ED guidance, it reflects the current administration's greater emphasis on protecting individual religious expression at school, provided the rights of others are not infringed. In doing so, it gives less emphasis to the concern that the religious expression of employees could appear to be the school's endorsement of religion (than does prior ED guidance).

The Guidance does provide useful examples of how the interplay between the constitutional clauses work in various scenarios, like private religious expression by students, in student groups/clubs, at school events, in assignments, by public school employees, and with respect to discipline and harassment. The Guidance can be found here: https://www.ed.gov/media/document/2026-guidance-constitutionally-protected-prayer-andreligious-expression-public-elementary-and-secondary-schools-113182.pdf

While ED's Guidance is not itself "the law," and should not be considered a substitute for discussing these difficult issues with a school attorney as they arise, the Guidance is worth reading by school board members and school officials for a better understanding of how these constitutional rights and obligations interact with each other in a school context. The Guidance is also important because the law requires Districts to annually certify that no policy infringes constitutionally protected prayer "as detailed in the guidance" ED provides. For these reasons, school board members and administrators should become familiar with the Guidance before considering revisions to District policies addressing religious expression and prayer in public schools.

Nothing about the recent ED Guidance requires wholesale changes to the NMSBA policies. However, the policy service is making the following minor changes to the master policies"

- **Policy Advisory No. 279 – ACD (A-0450) - Commitment to Religious Neutrality.** This policy is revised to better correspond to the state of existing law regarding constitutionally protected prayer and expression and to ensure that school officials understand that "interference with religion" includes restricting constitutionally protected religious expression. The change also adds policy JJAB—Limited Open/Closed Forum to the cross-referenced policies at the end.

[6] The ED Guidance does also address Mahmoud v. Taylor 606 U.S. 522 (2025) which was the subject of a July 2025 Policy Alert located here: https://www.nmsba.org/wp-content/uploads/2025/07/NMSBA-Policy-Service-Alert-July-2025.pdf

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- **Policy Advisory No. 280 – JHCB (J-1900) - Released Time for Religious Instruction.** These changes are made to make the policy better reflect the requirements of the Attendance For Success Act, 22-12A-9 NMSA.

- **Policy Advisory No. 281 – JJAB (J-3850) - Limited Open/Closed Forum.** This policy sets forth the requirements of the federal Equal Access Act (20 U.S.C. §§ 4071–4074), which requires secondary schools that allow non-curricular clubs or student groups to meet at school during non-instructional time to not discriminate against clubs or other student meetings based on the "religious, political, philosophical, or other content of the speech at such meetings." The changes are not substantive and are made only to make the policy more understandable and to add a Legal Reference to Policy JJAB.

If you have any questions or requests call Policy Services at (505) 469-0193 or email Dan Castille, Policy Services Director at rdcpolicyservices@outlook.com.

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ADVISORY 279

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COMMITMENT TO RELIGIOUS NEUTRALITY

The Board recognizes that religion has played an undeniable role in the formation of the world's peoples, its civilizations, the foundation of our country, and the lives of its citizens. The place of religion in our society should be recognized as an important one.

At the same time, under the Constitution of the United States, our schools ~~may neither actively sponsor nor interfere with religion~~ must remain neutral regarding religion, neither favoring nor disfavoring religion or any particular religious belief while respecting the constitutional rights of students and employees to engage in protected private religious expression.

The proper role of religion in the public schools is in its educational value in the study of subjects such as history, literature, and art, and in ~~non-religious~~ objective, educational recognition of the place of religion in society. In that capacity, and when appropriate within the curriculum, the subject of religion can provide a basis for schools to teach our children about various belief systems, and their current and historical impact on human culture. The nonreligious study of religion also provides a basis for the schools to play a vital role in instilling understanding, tolerance and mutual respect among people of different backgrounds.

Adopted: date of manual adoption

LEGAL REF.:
28-1-2 NMSA *et seq.*
~~Article 1 U.S. Constitution~~ U.S. Const. amend. I

CROSS REF.:
JB - Equal Educational Opportunities
JII - Student Concerns, Complaints, and Grievances
JJAB - Limited Open/Closed Forum
JK - Student Discipline
JKD - Student Suspension/Expulsion
KED - Public Concerns/Complaints about Facilities or Services

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ADVISORY 280

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RELEASED TIME FOR RELIGIOUS INSTRUCTION

A student may, subject to the approval of the school principal, be absent from school to participate in religious instruction for not more than one (1) class period per school day with the written consent of the student's parent or guardian at a time that is not in conflict with the academic program of the school. The principal's approval shall be exercised in a neutral and nondiscriminatory manner consistent with this policy and applicable law.

The public school shall provide time for the student to make up schoolwork missed during the absence.

The School District and the public school shall not assume responsibility for the religious instruction of any student or permit religious instruction to be conducted on school property.

~~Students at the school may be granted released time to attend religion classes near the school campus under the following conditions and guidelines:~~

- ~~The person who has custody of the student has given written consent.~~
- ~~Any religious instruction or exercise takes place at a suitable place away from school property designated by a church or religious denomination or group.~~
- ~~Released time should not interfere with the student's normal schedule.~~
- ~~Time shall be provided for the student to make up the school work if missed during the absence.~~
- ~~School credit will not be given for religion classes, nor will the course title be placed on the permanent record of the student.~~
- ~~Discipline problems, reporting to parents, and attendance and other procedures necessary to religion class operation shall be the responsibility of the religion class instructors or supervisors.~~

Adopted: date of manual adoption

LEGAL REF.:
22-12A-9 NMSA

CROSS REF.:
ACD - Commitment to Religious Neutrality

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ADVISORY 281

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LIMITED OPEN / CLOSED FORUM

~~Student meetings may be held in the school(s) of the District that offer instruction in grades seven (7) and eight (8) or above under a "limited open forum". Furthermore, insofar as the District has a procedure defined as a "limited open forum" under the provisions of Title VIII, the Equal Access Act, Section 801 *et seq*., the District school(s) shall offer to students a fair opportunity to conduct meetings using school facilities whereupon:~~ In any District school serving grades seven (7) or higher that has established a limited open forum, as defined by the federal Equal Access Act (20 U.S.C. §§ 4071–4074), the District shall not deny equal access or a fair opportunity to, or discriminate against, any students wishing to conduct a meeting on the basis of the religious, political, philosophical, or other content of the speech at such meeting, subject to the following conditions. A limited open forum exists when the District permits one (1) or more noncurriculum-related student groups to meet on school premises during noninstructional time.

- Such meetings are voluntary and student initiated.

- There is no sponsorship of such meetings by the District, District employees or governmental entities, or employees of governmental entities.

- District employees present at religious meetings will be present only in a nonparticipatory capacity.

- Such meetings shall not materially and substantially interfere with the orderly conduct of the educational activities of the District.

- Nonschool persons shall not be permitted to direct, conduct, control, or regularly attend such student group meetings.

Neither the District, any employee or agent of the District, nor of any State or federal governmental entity shall be permitted to:

- Influence the form or content of any prayer or other religious activity connected with student meetings.

- Require any person to participate in prayer or other religious activity.

- Expend public funds beyond the incidental cost of providing the space for such student-initiated meetings.

- Compel any employee of the District to attend a school meeting that is contrary to the beliefs of the employee.

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- Sanction meetings that are otherwise unlawful.

- Limit the rights of groups of students to avail themselves under the provisions of this policy to a specified numerical size.

- Abridge either New Mexico or U.S. constitutional rights of any employee, official, or student of the District.

Nothing in this policy shall be construed to limit the authority of the school or its agents or employees to maintain order and discipline on school premises, to protect the well-being of students and employees, and to assure that attendance of students at such meetings is voluntary.

Adopted: date of manual adoption

LEGAL REF.:
20 U.S.C. 4071 *et seq.,* Equal Access Act~~, (Section 801)~~

CROSS REF.:
ACD - Commitment to Religious Neutrality
KF - Community Use of School Facilities

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