

# EMERGING LEGAL ISSUES IN URBAN EDUCATION



## First Amendment Religious Liberty Issues Affecting Public Education

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## Presenters



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# Agenda

## I. Background

- A. History of the Establishment Clause
- B. History of the Free Exercise Clause

## II. Current Status of the Law

- A. What Is Allowed in Public Schools?
- B. What Is Not Allowed in Public Schools?
- C. Pending U.S. Supreme Court Cases

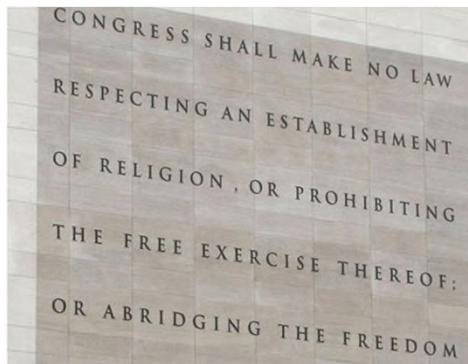
## III. Recent Guidance – U.S. Department of Education

- A. Executive Order
- B. Dept. of Education's Guidance & Proposed Rule
- C. OMB Memorandum



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## Background: The Free Exercise Clause and the Establishment Clause



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## 1<sup>st</sup> Amendment: Freedom of Religion

- Establishment Clause
  - “Congress shall make no law respecting an establishment of religion. . . .”
- Free Exercise Clause
  - “. . . or prohibiting the free exercise thereof.”



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## The Establishment Clause

- At a minimum, it is intended to **prohibit** the federal and state governments from declaring and financially supporting a national religion.
- But more than that, it is intended to **prohibit** any advantage that the government may give to a religion through the use of its resources.
- “Wall of separation” that the Constitution mandates between church and state.



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## The Establishment Clause

- “Government may not aid one religion, aid all religions, or prefer one religion over another.”
- **The Question:** What constitutes “aiding” or “preferring” a religion?
  - Often, if it looks like the government is endorsing religion, the Establishment Clause is an issue.



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## Historic Establishment Clause Cases

- *Everson*: Establishment Clause does not prohibit states from using taxpayer money to pay bus fares of parochial school students where it does the same for public school students.
- *Engel*: Public school districts may not require students to read aloud a prayer at the beginning of each school day.



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## Historic Establishment Clause Cases

- *Good News Club*: A public school may not exclude a religious club from meeting after hours at the school solely because the club is religious in nature.
- *McCreary County*: Public schools may not display the Ten Commandments if the purpose is to advance religion.



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## Historic Establishment Clause Cases

- The *Lemon* Test:
  1. Does the policy have a secular purpose?
  2. Will the policy have the primary effect of neither advancing nor inhibiting religion?
  3. Does the policy in question avoid entangling government and religion?



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## Historic Establishment Clause Cases

- Scenario: Your school has a policy that every Monday morning, classes begin with a two-minute moment of silence. Students are told they can choose what to do with the time: they can pray, meditate, read, plan their day, or contemplate silently. The purpose of the moment of silence is to encourage mindfulness. Does this violate the Establishment Clause?



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## The Free Exercise Clause

- Guarantees the right to practice a religion, or no religion at all, without government interference
- Caveats:
  - Religious practices cannot threaten rights, welfare, and well-being of others;
  - Government may not violate the Establishment Clause



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## The Free Exercise Clause

- **The Question:** When may the government enforce a law that burdens a person's ability to exercise his or her religious beliefs?



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## Historic Free Exercise Cases

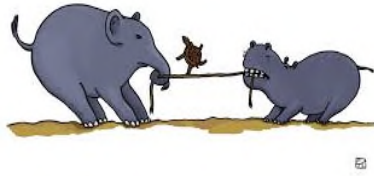
- *Sherbert v. Verner*: Unemployment benefits may not be denied to a claimant who refused employment because of her religious beliefs.
- *Yoder*: Wisconsin's requirement that all parents send their children to school at least until age 16, or face criminal charges, violated the First Amendment as applied to those in the Amish community.



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## Historic Free Exercise Cases

- *Smith*: The right to free exercise does not relieve a person of the obligation to comply with “valid and neutral laws of general applicability” on the ground that the law prevents or requires such conduct.
- *Smith* put limits on when the government may exempt religious individuals or groups from complying with laws for religious reasons.



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## Current Status of the Law



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## Current Status of the Law

- What may public students, teachers, and districts do?
- What can public students, teachers, and school districts *not* do?
- Pending court cases



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## Elementary and Secondary Education Act of 1965 (ESEA)

- Section 8524(a): The Secretary shall provide and revise guidance to State educational agencies, local educational agencies, and to the public on constitutionally protected prayer in public elementary schools and secondary schools.



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## Elementary and Secondary Education Act of 1965 (ESEA)

- Section 8524(b): As a condition of receiving funds under this Act, a local educational agency shall certify to the State educational agency that no policy of the local educational agency prevents or otherwise denies participation in constitutionally protected prayer in public elementary schools and secondary schools.



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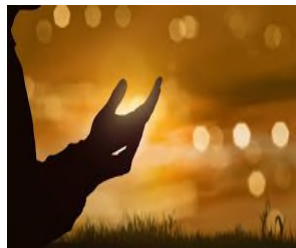
## Elementary and Secondary Education Act of 1965 (ESEA)

- Section 8524(c): The Secretary is authorized and directed to effectuate subsection (b) by issuing, and securing compliance with, rules or orders with respect to a local educational agency that fails to certify, or certifies in bad faith, that no policy prevents or otherwise denies participation in constitutionally protected prayer in public elementary and secondary schools.



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## Religion in Public Schools: *What's Allowed*



1. Student engagement with other students during non-curricular periods (e.g., recess, lunch)
2. Voluntary individual prayer during non-instructional time
3. Non-coercive, voluntary prayer presented and led by students during non-curricular periods



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## Religion in Public Schools: *What's Allowed*

5. Extra-curricular religious student organizations
6. Instruction *about* religion
7. Student-led prayer during extra-curricular activities if the school administration is not involved



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## Religion in Public Schools: *What's Allowed*

**Summary:** Students are allowed to engage in voluntary and individual conduct at schools so long as:

1. The conduct is not coercive; and
2. The conduct does not substantially interfere with the school's educational mission and activities.



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## Religion in Public Schools: *What's Not Allowed*



1. School promotion or encouragement of prayer or religious activity
2. Teachers or students leading the classroom in prayer or other religious instruction
3. Student prayer over the school's intercom system



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## Religion in Public Schools: *What's Not Allowed*

4. Student or clergy-led prayers before football games or other sporting events
5. Clergy-led prayers at official public school graduation ceremonies
6. Religious instruction



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## Religion in Public Schools: *What's Not Allowed*



- Religious conduct during school or a school event, regardless of who leads, that may coerce students into praying
- Official school endorsement of religious conduct



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## Religion in Public Schools: *What's Not Allowed*



- Remember The *Lemon* Test:
  - Does the policy have a secular purpose?
  - Will the policy have the primary effect of neither advancing nor inhibiting religion?
  - Does the policy in question avoid entangling government and religion?



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## *Trinity Lutheran Church of Columbia, Inc. v. Comer*

- Trinity Lutheran Church operated a licensed preschool and daycare, which incorporated daily religious instruction into its programs.
- The Missouri Dept. of Natural Resources offered Playground Scrap Tire Surface Material Grants that provided funds for qualifying organizations to purchase recycled tires to resurface playgrounds.



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## ***Trinity Lutheran Church of Columbia, Inc. v. Comer***

- Trinity applied for the grant and was denied because the Missouri Constitution prohibits money from the public treasury to aid, directly or indirectly, any church, section, or denomination of religion.
- Trinity claimed this was a violation of its 1<sup>st</sup> Amendment rights.
- The Supreme Court agreed.



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## ***Trinity Lutheran Church of Columbia, Inc. v. Comer***

- The exclusion of churches or religious schools from an otherwise neutral and secular aid program violates the Free Exercise Clause of the 1<sup>st</sup> Amendment.



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## Pending Cases with the Supreme Court

- *Espinoza v. Montana Dept. of Revenue*
  - Low-income mothers applied for a state issued tax-credit scholarship program to keep their children enrolled in a private, religious school.
  - Montana Department of Revenue enacted a rule that prohibited scholarship recipients from using their scholarships at religious schools, citing a clause in the state constitution.



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## *Espinoza*

- **Question:** Does a state law that allows for funding for education generally while prohibiting funding for religious schools violate the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause?



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## *Espinoza*

- Montana's argument: To permit the tax-credit scholarships to be used at religious schools would be for the state to subsidize religious education—a violation of the **Establishment Clause** and the Montana Constitution.
- Parents' argument: The state's law discriminates against religious conduct, beliefs, and status in violation of the **Free Exercise Clause** because it treats beneficiaries differently solely based on whether the aid will be used for religious purposes.



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## *Espinoza*

- Possible Outcomes:
  1. Take *Trinity Lutheran* a step further and prohibit distinguishing who may receive public funds based on religious uses
  2. Draw a line between funding for a secular purpose (*Trinity Lutheran*) and funding for religious instruction
  3. Make distinctions based on the specific facts of this case, and clarify very little about the pull between The Free Exercise and Establishment Clauses.



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## 2020 Developments



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## Recent Developments

1. Executive Order 13831
2. Dept. of Education's Proposed Rule (85 Federal Register 3190)
3. Dept. of Education's New "Guidance" (85 Federal Register 3257)
4. OMB Memorandum



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## Executive Order 13831

- May 3, 2018: Establishment of a White House Faith and Opportunity Initiative. This Executive Order signaled where the Trump Administration wanted to go.

*“The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs, and other Federal funding opportunities.”*



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## Executive Order 13831

- The Initiative is authorized to take specific actions, including:
  - Notifying the Attorney General of concerns raised by faith-based and community organizations about any failures of the executive branch to comply with protections of federal law for religious liberty
  - Identifying and proposing means to reduce burdens on the exercise of religious convictions barriers on engagement of faith-based and community organizations in Government-funded or Government-conducted activities and programs



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## U.S Department of Education's Proposed Rule

- Just one part of what the U.S. Department of Education released in January 2020 regarding religious liberty
- Does not affect public elementary and secondary schools



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## U.S. Department of Education's Proposed Rule



1. Seeks to implement Executive Order 13831
2. Made in response to *Trinity Lutheran* Supreme Court decision



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## U.S. Department of Education's Proposed Rule

3. Implements a new condition for direct grants and sub-grants requiring that a public institution of higher education not deny to religious organization any of the rights afforded to non-religious organizations
4. Revises the Strengthening Historically Black Colleges and Universities Program with more specific prohibitions on activities or services that constitute religious instruction, worship, or proselytization



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## U.S. Department of Education's Proposed Rule

5. Seeks to clarify how an educational institution may demonstrate that it is controlled by a religious organization for the purposes of Title IX
6. Proposes regulations to ensure public institutions of higher education that receive federal research or education grants comply with the First Amendment as a material condition of a grant or sub-grant



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## Effects of the Proposed Rule

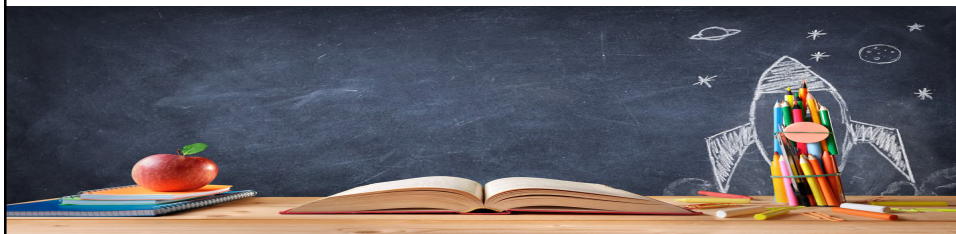
- Faith-based organizations at post-secondary institutions will be eligible to receive a grant or subgrant under a program of the Department on the same basis as any other private organization



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## U.S. Department of Education's New Guidance

- Updated guidance on constitutionally protected prayer and religious expression in public elementary and secondary schools



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## U.S. Department of Education's New Guidance

- Explains ESEA requirement that states report complaints against a LEA that allegedly denies a person the right to engage in constitutionally protected prayer.
- Clarifies that the ESEA requires states to provide a clear process for students, parents, and teachers to report violations of their right to pray.



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## U.S. Department of Education's New Guidance

- Does this actually change anything?
- Prayer is already protected in public elementary and secondary schools, subject to what we've already discussed.
- The ESEA has always contained the certification and reporting requirements.



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## U.S. Department of Education's New Guidance

- **What does it mean for you?**
  - Have a clear policy in place to ensure that your schools accommodate religious beliefs and prayer
    - Especially when it concerns religious activity or prayer during instructional times
    - Ensure the policy treats all religions and religious activity the same
    - Policy should not be limited to certain religious conduct
    - Continue to educate your teachers on the policy



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## OMB Memorandum

- Issued by the Office of Management & Budget (an office of the President)
- Provides guidance to executive departments and agencies on applying Executive Order 13798 in administering federal grants



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## OMB Memorandum

- Executive Order 13798: Established a policy of promoting free speech and religious liberty
  
- Attorney General's Memorandum: Religious organizations are entitled to compete on equal footing for Federal financial assistance used to support government programs.



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## OMB Memorandum

- Grant awarding agencies should ensure that states or public grantees:
  - Do not condition awards of Federal grant money in a manner that disadvantages applicants based on their religious character; and
  
  - Take appropriate action to ensure that grantees do not discriminate against applicants based on their religious character



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## OMB Memorandum



Focus = Free Exercise Clause and prohibiting discrimination on the basis of religion

Not a focus = Establishment Clause and government aid to religion



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## OMB Memorandum

- **What does this mean for you?**
  - It serves as guidance for executive agencies, but provides you with information about how these programs may operate in the future.
  - Within 120 days of the OMB Memo, all agencies administering a federal grant program must publish policies detailing how they will administer Federal grants in compliance with E.O. 13798, the AG's Memo, and the OMB Memo.



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## OMB Memorandum

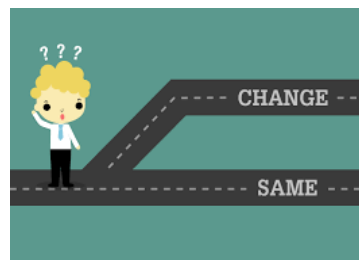
- **What does it mean for you?**
  - If your school district receives Federal grants, you should watch for any revised policies that the agency releases regarding the promotion of religious liberty.
  - If your school district receives Federal grants, it may now have to compete with religious schools.
  - Continue allowing prayer at appropriate times.



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## Overarching Questions

- What's actually changing?
- Are these new policies and "guidance" documents constitutional?



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## What's Actually Changing

- Under the U.S. Department of Education's Proposed Rule, there could be changes to higher education institutions.
- But under the Department's new "guidance," primary and secondary education institutions should continue permitting students to pray and exercise their religious beliefs at appropriate times.



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## What's Actually Changing

- The biggest change is likely to those who award Federal grants to education institutions and, therefore, those who receive Federal grants
- Possibly more competition for Federal grants



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## Constitutionality of These Policies

- The constitutionality of the policies regarding how Federal grants are to be awarded remains murky.
  - *Trinity Lutheran*: The exclusion of churches from an otherwise neutral and secular aid program is unconstitutional.
  - But the U.S. Department of Education’s Proposals and the OMB’s Memorandum would seemingly apply to all aid programs, not just neutral and secular programs.



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## Constitutionality of These Policies

- Free Exercise Clause: The policies certainly align with rights guaranteed by the Free Exercise Clause.
- However, they are crossing into territory that is similar to policies that violate the Establishment Clause under current Supreme Court precedent.



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## Constitutionality of These Policies

- The Supreme Court may expand upon *Trinity Lutheran* in deciding *Espinoza*, which would signal that these policies would be much more likely to be upheld by the Court.



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## Constitutionality of These Policies

- Because all Executive Agencies are dependent on the current President, these policies could be subject to change depending on the outcome of the 2020 Election.



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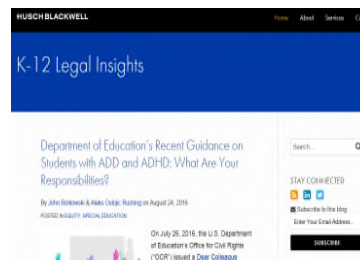
## Questions?



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**Join us for our next  
webinar!**

**Thursday, May 7, 2020  
2:30-3:45 p.m. EDT  
Topic TBD**



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