



# RELIGION & SCHOOLS

## School Law Update 2014

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### I. The First Amendment and Religion

♦ The primary law governing religion and schools comes from the *First Amendment to the U.S. Constitution* which reads in relevant part as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging free speech ....

♦ The *First Amendment* applies to school districts as political subdivisions of the state through the *Fourteenth Amendment* and parties may sue through 42 U.S.C. §1983. See [Engel v. Vitale, 370 U.S. 421 \(1962\)](#).

♦ This provision both protects private religious expression ("Free Exercise Clause") and prohibits government action to advance, coerce, or endorse religion in the public schools (the "Establishment Clause") or abridge free speech (the "Free Speech Clause"). This build-in dichotomy often invokes tension between the two clauses raising significant issues for schools as to which rights are protected and who aside from the Courts determines which rights are superior.

♦ The local Civil Liberties Union, the Anti-Defamation League, the Freedom From Religion Foundation, the Liberty Institute, the Humanist Legal Center etc., etc.

### II. Religion Update

**A. Prayer at Town Hall Meetings**—In [Town of Greece v. Galloway, 134 S. Ct. 1811 \(U.S. 2014\)](#) the U.S. Supreme Court (in a 5-4 decision) recently found in favor of a town that was inviting local, and mainly Christian, clergy to say prayers before the opening of monthly municipal meetings.

♦ The [Greece](#), court, however, was quick to point out that "school prayers" may be different than what they termed "legislative prayers."

♦ Most national authorities are not sold on [Greece](#) and its applicability in the school setting. One notes that the [Greece](#), decision is not a "get out of jail free card" and advises of the legal risk of "school prayers" being challenged. School officials are urged to review any such prayer practice "with counsel to avoid the becoming a test case for the Supreme Court's holding in [Greece](#)." See [Moyher & McCarthy, The United States Supreme Court Upholds the Practice of Municipal Prayer in Town of Greece, COSA I & A \(Sept. 2014\)](#).

**B. Holding Graduation in a Church**—In [Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283 \(U.S. 2014\)](#) the U.S. Supreme Court (*denied certiorari*) refused to hear the appeal of the Seventh Circuits decision in [Doe v. Elmbrook Sch. Dist., 687 F.3d 840 \(7th Cir. Wis. 2012\)](#) which held the holding of high school graduation ceremonies in the Elmbrook Church violated the *Establishment Clause* as "convey[ing] an impermissible message of endorsement" of religion by the school.

♦ Interestingly in [Elmbrook](#), U.S. Supreme Court Justices *Scalia* and *Thomas* dissented from the denial of *certiorari* opining that the Courts recent decision in [Greece](#), had abandoned what they called the "infinitely malleable" endorsement test noting that "the school's gymnasium, was cramped, hot, and uncomfortable [and t]he church offered more space, air conditioning, and cushioned seating" and that these

**C. Cheerleaders' Bible Banner Suit Heads to Texas Supreme Court (posted 8-11-14)**—A state district judge in 2013 ruled the cheerleaders religious themed banners at football games were constitutionally permissible but appeals court says case is moot. The school has appealed to the Texas Supreme Court. See <http://legalclips.nsba.org/2014/08/11/>.

**D. Coaches Still Praying (posted 8-14-14)**—The Humanist Legal Center, a secular legal firm, has sent a letter to Hall County School District officials warning it will file a lawsuit if football coaches at Chestatee High School do not end their practice of sharing prayer and Bible scriptures with players and placing those prayers and scriptures on official team stationary. See <http://legalclips.nsba.org/2014/08/14/>.

**E. What's New with the Pledge of Allegiance?**—Still being challenged around the country where New Jersey school sued in May 2014 to delete phrase "under God." (Posted 8-7-14). See <http://legalclips.nsba.org/2014/08/07/> and [Newdow v. Sch. Dist., 597 F.3d 1007 \(9th Cir. Cal. 2010\)](#)(pledge does not violate *Establishment Clause*). The Nebraska law at NDE Rule 10:

003.12 Each public school district shall require each such district's schools to establish a period of time during the school day, when a majority of pupils is scheduled to be present, during which pupils will be led in the recitation of the Pledge of Allegiance in the presence of the flag of the United States of America, in grades kindergarten through twelve. Pupil participation in the recitation of the Pledge of Allegiance shall be voluntary. Pupils not participating in the recitation of the Pledge shall be permitted to silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate.

**F. U.S. Dept. of Ed Guidelines on Religion**—See Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools. See [www.ed.gov](http://www.ed.gov).

### NOTES:

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