

**Arkansas Better Chance for School Success Programs**  
**Religious Activities**  
**Frequently Asked Questions**

The First Amendment outlines broad principles about religion, but does not provide “precise, detailed” guidelines about specific questions that you, as providers, might have. The U.S. Supreme Court has acknowledged the complexity of this issue in *Comm. for Public Education and Religious Liberty vs. Nyquist*, when the justices wrote that “cases arising under [the First Amendment] have presented some of the most perplexing questions to come before [the Supreme] Court.”<sup>1</sup> Because this is a complicated area, some questions and circumstances will have to be considered as they arise, so the following is initial guidance only.

1. What are the Establishment and Free Exercise Clauses?

The First Amendment to the U.S. Constitution contains two clauses about religion. The Establishment Clause declares that “Congress shall make no law respecting an establishment of religion.”<sup>2</sup> The Free Exercise Clause declares that “Congress shall make no law ... prohibiting the free exercise” of religion.<sup>3</sup> Both the Establishment and Free Exercise Clauses apply to the states.<sup>4</sup>

Together the Establishment and Free Exercise clauses require governmental neutrality toward religion.<sup>5</sup> Government aid must be “allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion” and must be “made available to both religious and secular beneficiaries on a nondiscriminatory basis.”<sup>6</sup>

2. Does the Establishment Clause prohibit all government aid to any church or religious organization?

No. The U.S. Supreme Court long ago rejected this notion. Government aid must have a non-religious purpose, but that purpose need not be *totally* non-religious. Government aid crosses the line when the *dominant* purpose is religious.<sup>7</sup> In 1997 the U.S. Supreme Court held that placing public school teachers in church-operated schools where religion is taught does not

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<sup>1</sup> *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

<sup>2</sup> U.S. CONST. amend I, § 1.

<sup>3</sup> *Id.*

<sup>4</sup> See *Arizona Christian School Tuition Organization v. Winn*, 536 U.S. \_\_\_ (2011).

<sup>5</sup> *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994).

<sup>6</sup> *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

<sup>7</sup> *Adland v. Russ*, 307 F.3d 471, 480 (6th Cir. 2002).

violate the Establishment Clause if: 1) the publicly employed teachers do not attempt to teach or impress religion; 2) the government aid is made available to both religious and non-religious beneficiaries on a nondiscriminatory basis; and 3) the government aid is available to all eligible children regardless of their religious beliefs or where they attend school.<sup>8</sup> Under this line of cases:

bus transportation, textbooks, and tax exemptions all gave aid [to church-sponsored activities] in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld.<sup>9</sup>

### 3. What is prohibited?

Governments may not *directly* support religious activities or use government funds to support religious programming. Courts have applied this principle to hold that government funds may not be used to:

- 1) Buy computers that will be used to advance a parochial school's religious mission;<sup>10</sup>
- 2) Build, maintain, or repair religious schools;<sup>11</sup>
- 3) Provide funds to a religious prison program when the funds are used in part for telephone, mailing, computer, copying, and other office costs that ultimately support religious indoctrination;<sup>12</sup> or
- 4) Provide a government building to a Christian nonprofit organization for use as a homeless shelter that provides religious services.<sup>13</sup>

Accordingly, Arkansas Better Chance for School Success ("ABC") Program funds may be used for all of the purposes listed in the proposed addition to the Arkansas Department of Education Rules Governing the Arkansas better Chance Program ("proposed rule"), but not for religious services, religious rituals, or religious instruction provided or carried out as a part of or during an ABC program. That includes buying computers that are used to advance religion, building, maintaining, or repairing a facility used for religious services or instruction, or paying

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<sup>8</sup> *Agostini*, 521 U.S. at 231.

<sup>9</sup> *Tilton*, 403 U.S. at 697.

<sup>10</sup> *Nyquist* at 762-3, 774.

<sup>11</sup> *Tilton* at 683.

<sup>12</sup> *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 418-19, 424-25 (8th Cir. 2007).

<sup>13</sup> *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1056-59 (9th Cir. 2007).

for telephone, mailing, computer, copying, and other office costs that support religious indoctrination.

4. Does this mean that children cannot pray or sing religious songs while at a facility that receives ABC funds?

Under the Establishment Clause, religious activities or instruction – including prayer or singing religious songs – organized or sponsored by an ABC provider may not occur during any part of the ABC day.<sup>14</sup> Under the Free Exercise Clause, children may pray or sing religious songs during the ABC day if acting on their own and not under the provider’s instruction or sponsorship.

5. What about organized prayer or bible study during the ABC day?

Religious activities occurring during a government-funded program would amount to government endorsement of religion in violation of the Establishment Clause.<sup>15</sup> As a result, religious activities may not occur during the ABC day.

6. May I extend the ABC day beyond 7 hours to make time for bible study or prayer during the day?

ABC program standards apply to everything that happens during the 7-hour ABC day,<sup>16</sup> including recess, lunch, and rest, and therefore apply to any religious activities that take place during the day. Even if that was not the case, any religious activity would have to be arranged in a way that could not directly or indirectly pressure a child to participate. A policy allowing a child to opt out of a religious activity does not solve the problem, because a child who decided not to participate in prayer time would be conspicuous (especially if there are no other scheduled events) and would be subject to both adult and peer pressures. “[T]he First Amendment prohibits the government from putting children in this difficult position.”<sup>17</sup>

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<sup>14</sup> The proposed rule defines “ABC Day” as the seven hours beginning with the first ABC activity of the day [including] all activities described in § 13 of the ABC Program Standards.”

<sup>15</sup> See *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990).

<sup>16</sup> See § 13 of the ABC PROGRAM RULES.

<sup>17</sup> *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1170 (7th Cir. 1993).

The Free Speech and Free Exercise Clauses protect the private (that is, not supported by public funds) practice of religion, and therefore, protect the right to engage in religious activities before or after the ABC day.<sup>18</sup>

7. May ABC providers display religious material on the walls?

Yes. Government aid must be available to both religious and non-religious beneficiaries on a nondiscriminatory basis,<sup>19</sup> and the Free Speech and Free Exercise Clauses forbid conditioning the receipt of public aid on the removal of religious materials from private premises. In practice, this means that government programs exist in churches where the display of religious materials is the norm. However, the Establishment Clause prohibits using such religious material or symbols for religious instruction or observance during as a part of any government-funded program, including ABC.

8. How will the Division of Child Care and Early Childhood Education Enforce the Constitution?

a. Complaints: The Division of Child Care and Early Childhood Education (“DCCECE”) will use existing complaint response procedures to investigate complaints that an ABC provider is conducting religious activities during an ABC day.

b. Monitoring Visits: DCCECE will review Establishment and Free Exercise Clause compliance during regular monitoring visits.

c. Determination of Violation: If the licensing specialist concludes that a violation exists, the specialist will inform the provider before leaving the facility. If the specialist is uncertain about a potential violation, the specialist will contact the Department of Human Services Office of Chief Counsel for guidance in making a compliance decision and communicating compliance status to the provider.

d. Correction: If DCCECE concludes that a violation exists, the provider will be informed and asked for a plan to correct the violation within 30 days. If the violation is not corrected within that time, DCCECE will initiate a formal enforcement action to discontinue public funds for the noncompliant program.

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<sup>18</sup> *Id.*

<sup>19</sup> *Agostini*, 521 U.S. at 231.

e. Enforcement Actions: Any enforcement action will have a single purpose: assuring the lawful use of public funds. No enforcement activity can seek to limit anyone's right to practice religion, or any parent's right to choose a child care provider that offers religious instruction and activities.