

LEGAL MAILBAG – DECEMBER 12, 2024



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The “Legal Mailbag Question of the Week” is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors. Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

Now that Thanksgiving is over, some of us are decorating for Christmas. That is normally fine with me, but one of my teachers may have gone overboard. A teacher in my school who doesn't celebrate Christmas complained that another teacher has placed a small crèche on her desk. The teacher told me that this religious display offends her and is unconstitutional because the other teacher was obviously attempting to proselytize her students.

The teacher who complained is a bit of a busybody, and my first impulse was to let things be. But after thinking about it further, I decided that I had better investigate. I went to the teacher's classroom, and sure enough there was a crèche sitting in plain view on the teacher's desk. “What have we here?” I asked rhetorically, but the teacher responded with annoyance, “It is a nativity scene, Captain Obvious. What of it?”

I decided to let her insubordinate comment go, and I cut to the chase. I told her that such religious displays are not allowed in a public school and that I wanted it gone by the end of the day. To my surprise, however, she responded, “Don't count on it!”

Does Legal Mailbag agree that a teacher cannot display a crèche on her desk in a public school classroom?

Signed,
Praying for Guidance

Dear Praying:

Whether teachers have the right to display personal items in their classrooms will depend in the first instance on the practice in your school. If teachers are permitted to display such items on their desks, the school has created a forum for personal expression, which would give rise to free speech rights. If not, such protections don't apply. However, Legal Mailbag thinks it likely that teachers in your school are permitted to have items of personal (rather than educational) interest on their desks. A picture of the teacher's family (or even the family pet), for example, would probably suffice to create a forum for personal expression.

If we concede that your school has established a mini-forum for personal expression on teachers' desks, we get to the heart of the matter -- can a teacher display a small crèche on the teacher's desk in the classroom? For many years, we would apply the *Lemon* test to answer such questions about religion in the schools:

- Does the action lack a secular purpose?
- Does the action advance or inhibit religion?
- Does the action entangle government with religion?

Applying the *Lemon* test, we would find that the action in question violates the Establishment Clause of the First Amendment if any of these questions are answered in the affirmative.

The United States Supreme Court announced this test in the case of *Lemon v. Kurtzman* (U.S. 1971), and for many years the *Lemon* test provided a helpful analytical framework for answering questions about religion in the public schools. However, that clarity was lost in 2022 when the United States Supreme Court decided the case of *Kennedy v. Bremerton School District*. There, the Court considered the First Amendment rights of a coach whose employment was terminated after he persisted in praying publicly after football games despite a directive not to do so. Given the *Lemon* test and the influence a coach has on the players, many predicted that Coach Kennedy would lose his case at the United States Supreme Court, but it was not to be.

Writing for the majority, Justice Gorsuch stated that the *Lemon* test is dead and that the coach's prayers were "double-protected" by both the Free Speech and the Free Exercise Clauses:

In the name of religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity.

In *Kennedy*, the Court noted that coaches were permitted to consider the time right after the game to be their own time, with the result that their speech and actions at that time were not "pursuant to duty" per *Garcetti v. Ceballos* (U.S. 2006), but rather personal to them and thus subject to regulation only for compelling reasons. Before *Kennedy*, Legal Mailbag would have confidently predicted that a coach's praying on the 50-yard line immediately after a football game would give rise to a legitimate concern over advancing religion (particularly among players who want more playing time) that would justify prohibiting such activity. After *Kennedy*, it is a new ballgame, and school officials must now exercise extreme caution in addressing employee religious speech outside the strict requirements of their position. See also Mooney and Sieira Millán, "[Kennedy v. Bremerton School District: A Coach's Prayers are Answered](#)," Shipman & Goodwin School Law Blog (June 29, 2022).

You have a decision to make. However, given the uncertainties, this is not a fight that Legal Mailbag would pick. May God bestow His wisdom upon you and give you peace.