


June 27, 2006

MEMORANDUM

To: Legal Affairs Designees
From: Frederick P. Schaffer 
Re: Religious Accommodation of Students

Our office regularly receives inquiries concerning requests by students for different types of religious accommodations. This memorandum provides a general description of the law governing such requests, the principles that should inform decisions on requests, and some examples of guidance given on past requests.

Legal Overview

As a public university, CUNY is subject to the requirements of the Free Exercise Clause of the First Amendment, as interpreted by the Supreme Court. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise Clause has been interpreted both to prohibit the state from punishing the expression of particular beliefs and, in certain circumstances, to require it to accommodate religious practices.

In the seminal case on religious accommodation under the First Amendment, *Employment Division Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Court held that the right to free exercise does not relieve a person from the obligation to comply with a neutral law of general applicability. Refusing to apply strict scrutiny, the Court in *Smith* upheld the denial of unemployment benefits to individuals terminated from their positions for violating state controlled substance laws, despite their claim that such laws violated their religious beliefs concerning the sacramental use of peyote. The Court left open the possibility of applying heightened scrutiny analysis when a case involves both a free exercise claim and another constitutional claim, such as freedom of speech or association; this is referred to as the "hybrid rights" doctrine.

Thus, after *Smith*, a claim for religious accommodation made by a student under the Free Exercise Clause must demonstrate either (i) the college's policy is not generally applicable; (ii) the policy is not neutral; or (iii) the policy implicates another constitutional provision. If the student meets that burden, the university then must show that its policy is justified by a

compelling state interest in order to prevail. Practically speaking, in most cases it will not be possible to satisfy the compelling interest standard.

General applicability

To be successful in a general applicability challenge, a claimant may show that a policy has a secular exception, such that the failure to make an exception to the rule for religious reasons is discriminatory. The government is not permitted to treat a request for religious accommodation less favorably than a request for secular accommodation unless there is a compelling reason for doing so. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 *1993) (ordinance prohibiting the unnecessary killing of animals, which had several secular exemptions including fishing, could not be applied to outlaw animal sacrifice by the Santeria congregation). If there are no exceptions, a rule is presumptively generally applicable, and a student will not have a right to a religious exemption from it.

In the higher education context, in *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996), a freshman student at the University of Nebraska sought an exemption from a campus rule requiring full-time freshman students to live on-campus based on his religious belief that living in a college dormitory would disrupt his Christian lifestyle. While the University argued that the parietal policy promoted academic achievement and tolerance and fostered diversity, it had three exceptions to the policy and had granted other exceptions in individual circumstances. The three exceptions were for commuter students living with their parents, freshmen students 19 or older, and married students. In light of these exceptions, and a record showing that, in application, the exceptions had resulted in only about two-thirds of freshman students living on campus, the court in *Rader* concluded that the rule was not generally applicable. Therefore, the court held that the student's religious beliefs should be accommodated.

Neutrality

A challenge may also be based on a rule's lack of neutrality. In *Rader*, the court found that the parietal rule was not neutral to religion, noting that the University had formerly accommodated freshman students in an off-campus Christian facility but then had abandoned that practice, that the administrator who denied the request had not conducted any fact-finding, that other individualized exemptions had been granted with little or no inquiry into the students' factual assertions while the plaintiff's assertions of religious requirements had been dismissed as untrue. Thus, in a case in which a number of secular exemptions are made on individualized bases, and a religious exemption is denied, the court may very well find the denial discriminatory.

Hybrid Rights

In practice, the hybrid rights approach has been applied sporadically and inconsistently by courts; many courts avoid deciding hybrids rights questions by determining that plaintiffs' claims of violation of a constitutional right are too weak, finding a compelling state interest nonetheless, or finding that a law does not impose a substantial burden on a religious practice. However, if a student makes a claim that a college policy or practice impinges on, for example,

freedom of speech, association, or another right in addition to free exercise, that case may be scrutinized more strictly under the hybrid rights doctrine.

State Law

In addition to the First Amendment, New York state law provides for religious accommodation in the specific situation in which a student, because of religious beliefs, is unable to attend classes or take an examination on a particular day or days. N.Y. Education Law § 224-a. Under this statute, it is a college's responsibility to allow for rescheduling of examinations or the opportunity to make up work missed in these circumstances. The law also specifically provides for allowing make up classes or examinations if regular classes or examinations are held on Friday after four o'clock p.m. or on Saturday; this provision is referred to as the "Sabbath law."

General Principles in Evaluating Student Requests for Religious Accommodation

As is apparent from the above discussion, in applying First Amendment Free Exercise Clause principles, courts have conducted extensive factual inquiries to determine if rules have been generally applicable and neutrally administered. Although the test for violation of the Free Exercise Clause is not facially stringent, in practice these cases often are difficult and unpredictable. Indeed, since CUNY colleges, like most educational institutions, are accustomed to considering and granting reasonable student requests for individualized treatment, in practice there may well be many examples of exceptions to rules of general applicability.

Thus, while the legal requirements for granting student requests for religious accommodation differ from and are not as strict as those for accommodating disabled students, in practice the analysis and result should not be altogether different. In general, if you receive a request for religious accommodation, it should be your practice to provide an accommodation unless there are very good reasons for not doing so. Generally, the student's religious sincerity should not be questioned, and the main analysis will involve determining if the request can be reasonably accommodated without interfering with pedagogical or other critical goals.

Probably the two most common types of accommodations requested are (i) scheduling accommodations and (ii) content accommodations. In general, requests for scheduling accommodations for religious reasons should be accommodated, particularly in light of the requirements of N.Y. Education Law § 224-a. For example, if a religious holiday conflicts with a class meeting or the date that an assignment is due, a faculty member should be able to arrange for the student to make up the work missed or to complete the assignment on a different date. Under state law, scheduling make up classes or examinations is required "where it is possible and practicable to do so." Thus, only if offering a make up to the student is virtually impossible should it be denied. Further, state law mandates that "no adverse or prejudicial effects shall result to any student" who asks for an accommodation under the law. While this provision is ambiguous, it appears to mean that a student's failure to attend classes or examinations because of a religious holiday may not be taken into account in calculating that student's grade for the course.



Content accommodations create more difficulties. These are requests for modifications of otherwise generally applicable course requirements for religious reasons. In general, the college and its faculty members are responsible for determining the content of the curriculum. Students are expected to study and discuss ideas in class, even if such ideas run counter to sincerely-held religious beliefs. *Cf. Yacovelli v. Moeser*, 2004 WL 1144183 (M.D.N.C. May 20, 2004) (orientation program requiring incoming freshman to read a book about the Islamic religion was an academic exercise that did not interfere with the Free Exercise of students' religion, particularly in light of alternative allowing those with religious objections to the book to write a paper explaining their objections in lieu of analyzing the book itself). Moreover, if a student has strong objections to the content of a class's curriculum, and the faculty member does not wish to accommodate the student's objections, the student may choose not to take or to withdraw from the class in a timely manner.


However, if withdrawal is not a viable option, particularly if the course is a required one for the student, and the faculty member does not wish to provide an alternative to the student, the college should consider the student's request for accommodation. Such a request should be evaluated by answering the following question: Are reasonable alternative means of satisfying the curricular requirement and achieving its pedagogical goal possible? In consultation with the faculty member teaching the class, the college should consider the difficulty of administering the accommodation, the burden on the student's sincerely-held core beliefs, and the importance of the particular requirement to the course. The college should also determine whether exceptions or alternatives to satisfying the requirement have been allowed in the past.

A recent case involving a request for content accommodation demonstrates the need to analyze requests individually to determine and assess the particular facts in each case. In *Axson-Flynn v. Johnston*, 356 F.3d 1277 (10th Cir. 2004), a University of Utah student in the University's actor training program raised objections to reciting certain lines in a script that contained four-letter expletives because of her religious objection to those words. While she was permitted to omit those words from her lines, she then was advised that she had to leave the program or modify her values. She withdrew from the program and brought suit on free exercise and free speech grounds. The district court initially dismissed her claims, finding that the performance requirement was facially neutral and of general applicability, and effectively deferring to the faculty's pedagogical goals for the program. The court of appeals, however, reversed for additional fact-finding based largely upon evidence that exceptions had been granted in the past to other students and to Axson-Flynn herself and that comments allegedly had been made questioning the sincerity of the student's beliefs.

Examples of Recent Requests and Determinations

The resolution of requests for religious accommodation at different CUNY colleges should be illustrative of how to analyze such requests.

My office assisted with responses to two requests for content accommodations. In one case, a student asked to be excused from participating in the dissection of a cat in a biology class because of her religious beliefs. After determining that the pedagogical purpose of the dissection could be met through a reasonable alternative, which included building a clay model of the



human muscular, venous, and arterial systems, the college decided to excuse the student from that requirement. In contrast, a student's request that she not be required to read Dante's *Inferno* and *Sundiata*, a Mali epic, because of her religious beliefs was denied; study of these works was a core requirement of the course, and therefore it was not reasonable to allow the student to be excused from this part of the curriculum.

In response to a student's request for a dedicated room to engage in private prayer several times a day, the college determined to accommodate that request and found a room for the student. Although colleges are not required to set aside an area for religious use, it does not violate the Establishment Clause of the First Amendment to do so. *Sante Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000). Accordingly, this type of request ordinarily should be granted if space is available and its use for prayer would not interfere with other uses. In addition, if a college has allowed students of one religion to use space, it must allow students of other religions the same degree of access to that space.

Another inquiry involved a student who wished to wear a ceremonial knife for religious reasons while on campus, in conflict with CUNY rules prohibiting the carrying of weapons. In that case, security officers had found the knife, and our office was asked whether the student had to be allowed to carry it as a religious accommodation. In this circumstance, there were no exceptions to this rule of general applicability. Moreover, the public safety concerns overrode the student's interest in religious accommodation. Therefore, it was our determination that religious accommodation was not appropriate in this case.

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In sum, while efforts should be made to grant students' requests for religious accommodation whenever possible, each request should be analyzed on its own facts and decided accordingly. Many of these requests present difficult issues, and therefore consultation with the Office of General Counsel is appropriate in those cases. If you have a question about an individual student request for religious accommodation, please consult with either Kathy Raymond (Katherine.Raymond@mail.cuny.edu or (212) 794-5759) or Hilary Klein (Hilary.Klein@mail.cuny.edu or (212) 794-5472).

c: Chief Academic Officers
Chief Student Affairs Officers