

MODEL SCHOOL CHAPLAINCY POLICY

INTRODUCTION

On June 18, 2023, Governor Greg Abbott signed Texas Senate Bill 763. The new law allows a public school district or an open-enrollment charter school to “employ or accept as a volunteer a chaplain to provide support, services, and programs for students”¹ Districts must vote by March 1, 2024, on whether to adopt a chaplaincy policy.² Adding a school chaplaincy program to existing student services can provide a diverse student community with well-rounded support. The model chaplaincy policies provided below are designed to guide districts in developing policies that serve students well and comply with the Constitution.

Government chaplaincy programs have a long history, and courts consistently uphold them in a wide variety of circumstances, including the military, prisons, hospitals, and legislative bodies.³ Chaplaincy programs provide crucial support services, recognizing that many individuals value the opportunity to seek support that is provided from a religious perspective.⁴ The Supreme Court repeatedly explains that the First Amendment’s Establishment Clause does not “‘compel the government to purge from the public sphere’ anything an objective observer could reasonably infer endorses or ‘partakes of the religious.’”⁵ Last year, in *Kennedy v. Bremerton School District*, the Supreme Court overruled a 50-year precedent, *Lemon v. Kurtzman*,⁶ which incorrectly held that government action that lacks a secular purpose, advances religion, or entangles the government with religion violated the Establishment Clause. That doctrine—the *Lemon*

¹ Act of Jun. 18, 2023, 88th Leg., R.S., S.B. 763 (to be codified as an amendment Tex. Educ. Code tit. 2, subd. D, Ch. 23 and § 48.115) (“SB 763”).

² *Id.*

³ See *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (upholding military chaplaincy); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding state legislature’s practice of opening sessions with prayers by a State-employed chaplain); *Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (upholding prison chaplains); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988) (upholding public hospital chaplaincy); *Freedom From Religion Found. v. Mack*, 49 F.4th 941 (5th Cir. 2022) (upholding justice of the peace’s chaplaincy and courtroom prayer program); see also *Murray v. Buchanan*, 720 F.2d 689, 690 (D.C. Cir. 1983) (upholding public funding of congressional chaplains).

⁴ See, e.g., *Mack*, 49 F.4th at 944–45 (describing justice of the peace’s volunteer chaplaincy program).

⁵ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

⁶ 403 U.S. 602 (1971).

test—is no longer good law. Cases grounded in *Lemon’s* framework⁷ may no longer be controlling, as the Supreme Court “overrule[d] *Lemon v. Kurtzman*, and call[ed] into question decades of subsequent precedents that it deem[ed] offshoots of that decision.”⁸ Accordingly, perceived religious endorsement by the government is no longer the operative legal test. Instead, courts evaluate whether government action violates the Establishment Clause by reference “to historical practices and understandings”⁹ at the time of the Founding. And, as mentioned above, courts have upheld government chaplaincies many times based on the history and tradition of these programs.

Of course, schools may not coerce students to engage in religious exercise,¹⁰ and therefore chaplain services should be strictly voluntary for students to use. However, in *Kennedy*, the Court rejected the notion that the mere presence of religious activity is somehow coercive.¹¹ Rather, the Court found no coercion “where there is no evidence anyone sought to persuade or force students to participate[.]”¹²

First Liberty provides the following model policies as general guidance to assist school boards in developing school chaplaincy policies in accordance with SB 763. This document does not create an attorney-client relationship, and it is not to be used as a substitute for legal advice from a licensed attorney. Because this is a developing area of law, First Liberty Institute and its attorneys do not warrant, either expressly or impliedly, that the law, cases, statutes, and rules discussed or cited in this guide have not been changed, amended, reversed, or revised. Likewise, First Liberty and its attorneys do not express any opinion as to how a court would rule in a particular case. First Liberty encourages school districts considering adopting a chaplaincy policy to contact First Liberty at FirstLiberty.org for a legal consultation that is adapted to your unique situation.

⁷ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993); *Busch v. Marple Newton Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009); *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099 (E.D. Tex. 2022).

⁸ *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) (describing the majority opinion); *id.* at 2427–28 (“In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.”) (cleaned up) (quotation omitted).

⁹ *Id.* at 2427 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

¹⁰ See *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948).

¹¹ *Kennedy*, 142 S. Ct. at 2430–31.

¹² *Id.*

MODEL SCHOOL CHAPLAINCY POLICY VERSION 1 (EMPLOYED CHAPLAINS)

General

[School district] shall retain one or more chaplains as employees to provide chaplain support and services to the student body of the campuses or schools designated by *[school district]*.

The mental, emotional, social, physical, and spiritual challenges faced by today's students are immense. Concern about student mental health and physical safety is at an all-time high. For many students, the school environment may be the only opportunity they have to access the support, help, and care they need to meet these challenges. We have resources to help address some of these concerns, including counselors and dedicated teachers and staff to whom students may turn. Chaplains will serve as an additional student resource, recognizing that some students may be more comfortable or otherwise prefer to seek support from a chaplain.

It is solely the decision of the individual student whether to seek the support or services of a chaplain. All students are welcome to utilize a chaplain but no student may be required to do so.

All communications between a chaplain and a student intended by the student to be confidential are privileged and confidential, and that privilege and confidentiality may not be breached except as required by law.

Responsibilities

A chaplain's primary responsibility is to be present and available for any student who may seek such chaplain's help or care.

A chaplain will be a visible, integral member of the assigned school or campus. Such chaplain will support the school's students and student groups at their request and will work to develop positive, supportive relationships based on compassion and mutual respect with any students that so desire.

A chaplain will be present and visible both in the various activities in which students participate during the school day and the areas of the school or campus at which students are found. A chaplain may

refer students to other resources and personnel the school provides that might assist the students in any given situation.

A chaplain shall not proselytize or disparage any religion, belief, lack of belief, or faith group. A chaplain's provision of care, help, or counsel consistent with his beliefs or convictions to students who seek such care, help, or counsel is not proselytization or disparagement.

A chaplain shall not have disciplinary authority over students or student groups.

[School district] shall provide any chaplain with office space suitable for confidential interactions with students and visible to and accessible by the students of the campus or school served by such chaplain.

[School district] shall ensure all students of a campus or school a chaplain is assigned are aware of such chaplain, the location of the chaplain's office, their continuing opportunity to seek the chaplain's help or care, the means by which they can request and receive the chaplain's help or care, that their confidential interaction with the chaplain will remain confidential unless otherwise required by law, and that their choice to seek a chaplain's help or care is strictly and always voluntary.

The school board may hire or select a chaplain directly or delegate such hiring authority in accordance with board policy.

In all actions taken and decisions made pursuant to this policy, *[school district]* shall comply with Texas Education Code section 23.001 and other applicable state and federal law.

Qualifications

[Option 1: For purposes of this policy, a chaplain may be anyone whom the school board concludes can fulfill the roles and responsibilities described in this policy.]

[Option 2: For purposes of this policy, a chaplain shall be a person who obtains an ecclesiastical endorsement from his or her faith group certifying that such chaplain is:

1. A minister, rabbi, priest, imam, lay leader, or similar functionary of the faith group;
2. Qualified spiritually, morally, intellectually, and emotionally to serve as a chaplain for [*school district*];
3. Sensitive to religious pluralism and able to provide for the free exercise of religion by all students.]

In accordance with Texas Education Code section 23.001, state licensure or certification is not required, but chaplains must comply with criminal history record laws and have no history of offenses for which registering as a sex offender is necessary.

MODEL SCHOOL CHAPLAINCY POLICY VERSION 2 (VOLUNTEER CHAPLAINS)

General

[School district] may accept one or more volunteer chaplains to provide support and services to the student body of the campuses or schools designated by *[school district]*.

The mental, emotional, social, physical, and spiritual challenges faced by today's students are immense. Concern about student mental health and physical safety is at an all-time high. For many students, the school environment may be the only opportunity they have to access the support, help, and care they need to meet these challenges. We have resources to help address some of these concerns, including counselors and dedicated teachers and staff to whom students may turn. Chaplains will serve as an additional student resource, recognizing that some students may be more comfortable or otherwise prefer to seek support from a chaplain.

It is solely the decision of the individual student whether to seek the support or services of a chaplain. All students are welcome to utilize a chaplain but no student may be required to do so.

All communications between a chaplain and a student intended by the student to be confidential are privileged and confidential, and that privilege and confidentiality may not be breached except as required by law.

Responsibilities

A chaplain's primary responsibility is to be present and available for any student who may seek such chaplain's help or care.

A chaplain will be a visible, integral member of the assigned school or campus. Such chaplain will support the school's students and student groups at their request and will work to develop positive, supportive relationships based on compassion and mutual respect with any students that so desire. A chaplain may refer students to other resources and personnel the school provides that might assist the students in any given situation.

A chaplain shall not proselytize or disparage any religion, belief, lack of belief, or faith group. A chaplain's provision of care, help, or counsel consistent with his beliefs or convictions to students who seek such care, help, or counsel is not proselytization or disparagement.

A chaplain shall not have disciplinary authority over students or student groups.

[School district] may provide any chaplain with office space suitable for confidential interactions with students.

[School district] shall notify all students of a campus or school in which a volunteer chaplain serves of their continuing opportunity to seek the chaplain's help or care, the means by which they can request and receive the chaplain's help or care, that their confidential interaction with the chaplain will remain confidential unless otherwise required by law, and that their choice to seek a chaplain's help or care is strictly and always voluntary.

The school board may select a chaplain directly or delegate such selection authority in accordance with board policy.

In all actions taken and decisions made pursuant to this policy, *[school district]* shall comply with Texas Education Code section 23.001 and other applicable state and federal law.

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