University of Louisiana at Lafayette
3rd Annual Louisiana K-12 School Law Conference
Wednesday, April 26, 2017

PRAYER IN PUBLIC SCHOOLS
Constitutional Rights and Responsibilities

PLUS

ADDITIONAL SELECTED RELIGIOUS ISSUES

FOR

REVIEW

Kenneth E Lane, Ed.D.

In the Beginning…

School District of Abington Township v. Schempp and Murray v. Curlett 374 U.S. 203, 83 S. Ct. 1560 (1963).

Decision rendered: State enforced Bible reading and prayer in public schools are unconstitutional.

Misinterpretation: God has been taken out of the public schools.

Actuality: Students can organize and lead prayer, but not administrators.

Federal Government Input

1. Section 9524 of the Elementary and Secondary Act ("ESEA") of 1965 as amended by the No Child Left Behind Act of 2001 (Bush Presidency).

2. On December 10, 2015, President Obama signed the Every Student Succeeds Act (ESSA), P.L. 114-95 which reauthorizes the 50-year-old Elementary and Secondary Education Act (ESEA).

Federal Government Policy

Section 9524 of the Elementary and Secondary Education Act ("ESEA") of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary of Education to issue guidance on constitutionally protected prayer in public elementary and secondary schools.

In addition, Section 9524 requires that, as a condition of receiving ESEA funds, a local educational agency ("LEA") must certify in writing to its State educational agency ("SEA") that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.

Applying the Governing Principles in Particular Contexts

Prayer During Non-instructional Time

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities.

Organized Prayer Groups and Activities

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups.

Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression.

Teachers, Administrators, and Other School Employees

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students.

Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities.

Moments of Silence

If a school has a "minute of silence" or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time.

Teachers and other school employees may neither encourage nor discourage students from praying during such time periods.

Accommodation of Prayer During Instructional Time

It has long been established that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a significant burden on their religious exercise, where doing so would not impose material burdens on other students.

Religious Expression and Prayer in Class Assignments

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school.

Student Assemblies and Extracurricular Events

Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech.

Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.

By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content.

Prayer at Graduation

School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer.

Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.

Baccalaureate Ceremonies

School officials may not mandate or organize religious ceremonies.

However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies.

In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

Impact on School Administrators, Teachers, and Staff

Free Speech Rights

Public school administrators, teachers, and staff have the right to free speech and the right to exercise their rights with other school personnel, but not with students.

School personnel are not permitted by the Supreme Court's decisions and interpretations to engage in the sharing of religious beliefs including prayer with students as it is deemed to be an overt effort to establish state religion within the school setting which directly violates the Establishment Clause of the Constitution.

Silent Prayer

The Supreme Court decision in *Wallace v. Jaffree* invalidating silent prayer in public schools pertained to a 1981 Alabama law. However, the Court left the door open for laws that did not have a legislative intent to compel prayer as they would likely survive an Establishment Clause challenge in the courts. 472 U.S. 38 (1985).

With the door left open for additional court cases, The issue of silent prayer continues to be a case-by-case review rather than a blanket ruling for all schools.

Communication

Neither students nor teachers shed their constitutional rights (including their free speech and free exercise rights) at the schoolhouse door.

However, the courts have only upheld these rights in public schools with respect to other school personnel, not to teacher communications with students.

The school may, and in regard to religious rights including prayer, and is expected to control a teacher's speech in front of students.

Communication (continued)

The teacher is a school district employee and a state employee and anything said concerning religion can be attributed to the school district and can become an unconstitutional establishment of religion.

When teachers communicate with other school employees, however, they have the right to express themselves as long as such communication takes place in the faculty room or otherwise out of hearing of students.

A cautionary note for teachers is that this right does not extend to conversations which are objectionable to fellow employees.

Prayer at Graduation Exercises

Graduation prayers were ruled unconstitutional in 1992 by the Supreme Court in *Lee v. Weisman* since the principals were permitted to invite clergy members to deliver invocations and benedictions at graduation ceremonies which could make students feel like they had to participate.

In a tangent ruling, the Supreme Court in *Santa Fe Independent School District v. Doe* invalidated a Texas school district's policy in which school personnel led or encouraged student led prayer at sporting events or extracurricular activities.

Prayer Related Issues in the Classroom

The Pledge of Allegiance has been upheld as constitutional. The words "under God" do not make the Pledge a prayer.

The Supreme Court, especially in *School District of Abington Township v. Schempp*, has emphasized that it is permissible to teach the Bible and other religious documents from a literary, cultural, or historical perspective.

The Supreme Court ruled in *Stone v. Graham* that the posting of the Ten Commandments in the classroom is unconstitutional. *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192 (1980).

School Personnel and Bible Studies

School personnel are free to have organized faculty prayer groups and Bible study groups as a practice of their faith as long as it is during appropriate times while at the school. Appropriate may be defined as during lunch time or before and after school as long as they do not have supervision responsibilities.

Teachers may not exercise this right with or in the presence of students due to Establishment Clause concerns.

Student Devotional Meetings During Non-Instructional Time

In 1990, the Supreme Court rejected an Establishment Clause challenge to the Equal Access Act (EAA) in *Board of Education of the Westside Community Schools v. Mergens* when it declared that a public secondary school allowing even one noncurricular student group to meet is subject to the EAA and, thus, must grant school access to all non-disruptive student groups.

Personal Religious Material in the Classroom

The courts have generally ruled that it is a violation of the Establishment Clause by making an overt expression of a particular religion through the use of personal religious materials in the classroom. Keeping a personal Bible or other religious objects on the desk if they are not being used as part of an objective and neutral academic curriculum is prohibited.

Likewise, reading a Bible during free reading times in the classroom while students are present is prohibited. However, keeping a personal Bible in the desk or in another location out of sight of the students is acceptable. Reading the Bible when students are not present in the classroom is also acceptable.

Personal Religious Material in the Classroom (continued)

Keeping Bibles in a classroom library is permitted only if the Bibles are included with other religious texts such as the Quran enabling students to consult them for academic reasons.

It is important to address the distribution of religious materials in the classroom or on school property. In general, the courts have allowed students to distribute religious materials such as newsletters if the school has been open to indiscriminate use which is then a public forum.

However, the distribution of religious materials such as the

Gideon Bible on school property has been ruled unconstitutional.

Personal Religious Garb

The definition of what constitutes religious garb is lacking. Consequently, rulings by the courts have generally been mixed primarily due to the hesitancy of the courts to invade the religious rights of students or school personnel.

Thus, issues such as wearing of the hijab by Muslim women teachers still continue to perplex school districts due in large part to the lack of specifics from the courts.

Likewise, the wearing of religious jewelry such as a cross or Star of David creates similar confusion for school officials.

Sponsorship of Student Bible Clubs and Student-Led Prayer Activities

The Equal Access Act (EAA) does not permit teachers to participate in the substantive religious discussions of a student religions club since the clubs must be both student-initiated and student-led.

Teachers assigned by the school administration to attend meetings of a Bible Club may attend only in a non-participatory capacity.

Sponsorship of Student Bible Clubs and Student-Led Prayer Activities (continued)

It is clear that neither school officials nor teachers may encourage or discourage student participation in student-initiated and student-led prayer events such as See You at the Pole (SYATP). However, the school may appoint a teacher or several teachers to monitor these events, but the monitor cannot become a participant.

Coach-Led Prayer at Athletic Events

Coaches generally are unclear about their right to pray with students before an athletic event.

While the courts have held this practice to be unconstitutional, it is prudent for coaches to be absent from pre-game prayers and permit the students to initiate and lead the prayers on their own.

If coaches are present, they are to be respectful, but not actively participate in the student prayers.

Faith Healing and Prayer versus Medical Treatment for Students

School officials need to be aware of the impact of dealing with parents whose religious beliefs demand faith healing and prayer instead of medical treatment for their children.

If a student from one of these families requires medical treatment, decisions will need to be made on the severity of the injury and transportation to a local hospital overriding the demands of the parents.

Faith Healing and Prayer versus Medical Treatment for Students (continued)

While the litigation in faith healing and prayer versus medical treatment has remained outside the school setting, it is reasonable to expect that it will make its way into the schools. The first indicator of this movement is the requirement in three states – West Virginia, Mississippi, and California – that students must have their vaccinations in order to be enrolled in the public or private schools within those states.

For instance, the language from the California law which took effect on July 1, 2016, states that parents can no longer refuse to vaccinate their children in public or private schools and child care centers based on their personal opposition. Parents can no longer obtain a personal belief exemption to 10 school-required vaccinations; however, they can obtain for their children a medical exemption or an exemption if attending school at home or independently with no classroom instruction.

Thoughts Regarding Prayer in School from a Multiple Faith Perspective

Prayer in schools is not a Christian only endeavor. If prayer in schools is to be permitted, equality must be guaranteed for all students— Atheist, Buddhism, Christian, Catholic, Hinduism, Islam, Judaism, Native American, and all other faiths.

The question is: Are we willing to allow our children to hear the prayers of other faiths on an equal footing with our own faith and beliefs?

Additional Selected Religious Issues

Special Education

Litigation will continue.

Individuals with Disabilities Education Act

Access to Extracurricular Activities by Students with Disabilities (Ex: Athletic Teams)

Demand for Services from Public School Systems for Students in Private Schools

Homeschooling Demands for Services

Vouchers

Uncertainty and confusion abound.

Will voucher plans allow public funds to flow to religious schools?

If public monies are used to fund attendance at religious schools, do school services follow the funds since they are public funds?

For More Information

Religion and Law in Public Schools (February 2017) by Steve Permuth et.al. Available from the Education Law Association.

Education Law Association, www.educationlaw.org

Professional organizations for administrators such as NASSP, NAESP, ASBA, and ASCD. Join one of them so you have access to new information.

Final Thoughts

Use Common Sense in making decisions regarding prayer in school and other religious issues.

Do NOT make decisions when upset. They usually cause you more problems.

Talk to each other – especially your superintendent about these issues. You are not an island. You are a team!

Keep up-to-date on information. It only takes one court decision to change everything you thought was correct.