ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

CONSTITUTIONALITY OF PRAYER AT HIGH SCHOOL GRADUATION/BACCALAUREATE

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. Alliance Defending Freedom frequently assists students, teachers, and public schools in understanding their rights and responsibilities concerning seasonal religious expression. Each legal situation differs, so the information provided below should only be used as a general reference and should not be considered legal advice.[1] If you think your rights have been violated as a result of a restriction on your religious expression at a public school or if you represent a public school whose rights are being attacked, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1-800-835-5233, or visit our website at www.ADFLegal.org and select the "Request Legal Help" button to submit a request for legal assistance.

The following memorandum analyzes the constitutionality of graduation prayer and baccalaureate ceremonies to assist parents, school boards, superintendents, principals, educators, and administrators in making constitutionally-correct decisions about these events. After the Supreme Court decisions in *Lee v. Weisman* and *Santa Fe Independent School District v. Doe,* confusion on the issue of prayer at official school events is understandable. All too often, school officials may feel trapped between a "rock and a hard place" when dealing with the First Amendment. It is crucial to note, however, that *the Supreme Court has never said that students are forbidden to pray at graduation or to hold baccalaureate ceremonies.*

If you are challenged by groups for allowing student-initiated, student-led prayer at graduation, we may be able to assist you. This memorandum provides an overview of First Amendment law in the school context and is followed by an analysis of specific criteria needed for a constitutional policy.

I. Religious Speech Is Protected Under the First Amendment

It is a fundamental principle of constitutional law that a government body may not suppress or exclude the speech of private parties just because the speech is religious or contains a religious perspective.[2] This principle cannot be denied without eviscerating the essential First Amendment guarantees of free speech and religious freedom.

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[2] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Religious speech is protected by the First Amendment and may not be singled out for discrimination.[3] As stated by the Supreme Court:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted) (emphasis in original).

II. Students Do Not Abandon Their Constitutional Rights of Free Speech When They Attend Public School

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The Supreme Court has stated that a student's free speech rights apply "[w]hen [they are] in the cafeteria, or on the playing field, or on the campus during authorized hours. . . ." *Id.* at 512-13. In *Tinker*, the Supreme Court stressed that student speech is not subject to official approval:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expressions of those sentiments that are officially approved.

Id. at 511. This includes prayer: "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (emphasis added). School officials have no authority to approve, edit or censor student speech because it contains a religious component.

III. The So-Called "Separation of Church and State" Does Not Require the Banning of Student-Initiated, Student-Led Baccalaureates or Graduation Prayers

[3] *Good News Club,* 533 U.S. at 108-10; *Widmar*, 454 U.S. at 269 (citing *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)); *see also Neimotko v. Maryland,* 340 U.S. 268 (1951); *Saia v. New York,* 334 U.S. 558 (1948); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

School officials often believe (mistakenly) that allowing students to engage in religious speech at school would violate the so-called "separation of church and state" – a doctrine often cited in connection with the Establishment Clause of the First Amendment. This very argument has been reviewed and *rejected* by the United States Supreme Court. In *Board of Education of the Westside Community Schools v. Mergens*, the Supreme Court stated as a general proposition that the activities of students in a public school do not present any Establishment Clause problem:

> Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . .
>
> *We disagree.*

496 U.S. 226, 249-50 (1990) (emphasis added).

The Establishment Clause of the First Amendment merely "requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Bd. of Educ.,* 330 U.S. 1, 18 (1947). Likewise, "[s]tate power is no more to be used so as to handicap religions, than it is to favor them." *Id.* Therefore, the Establishment Clause has *no* applicability to student-initiated, student-led prayers or baccalaureate ceremonies in the graduation context. Restricting or banning such events because they involve religious prayer or worship violates the constitutional requirement of neutrality. *Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993). But it must be observed that "a prayer is not 'student-initiated,' and hence constitutional, simply because the initial idea for the prayer was a student's. . . . The true test of constitutionality is *whether the school encouraged, facilitated, or in any way conducted the prayer.*" *Holloman v. Harland*, 370 F.3d 1252, 1287 (11th Cir. 2004) (emphasis added).

While it is true that school-endorsed graduation prayers have been declared unconstitutional, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (emphasis added). Private student speech can never violate the Establishment Clause. *Id.; see also Pinette*, 515 U.S. at 764. Student-initiated, student-led baccalaureates and graduation prayers *are* private student speech.

A school's "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students." *Mergens*, 496 U.S. at 251. Any possible misperceptions that the school is "endorsing religion" are cured by the school's ability to insert disclaimers. *See Pinette*, 515 U.S. at 769 ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such."); *id.* at 776 ("the presence of a sign disclaiming government sponsorship or endorsement on the . . . cross, would make the State's role clear to the community.") (O'Connor, J., concurring); *id.* at 784 (disclaimer

cures confusion over misperceptions of endorsement) (Souter, J., concurring in part and concurring in judgment). Even the Ninth Circuit has adopted this position in the school context:

> [I]t is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. *The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it.*

Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (emphasis added) (quoting *Hedges*, 9 F.3d at 1299-1300) (internal quotations and brackets omitted).

IV. Criteria for Constitutional Baccalaureate and Graduation Policies

A school may certainly permit a baccalaureate ceremony with religious content on its property when the event is sponsored and organized solely by private parties. A private event that happens to be graduation-related simply does not pose a constitutional problem, as long as it is clearly private. As the Supreme Court held in *Santa Fe*, a key question in deciding the constitutionality of prayer at a school event is whether an objective observer would view it as a "state endorsement of prayer in public schools." 530 U.S. at 308. The same holds true for baccalaureate ceremonies.

Graduation ceremonies have slightly different rules because a private speaker (the student) is speaking at a government sponsored event. In the graduation context, we think the following parameters prevent any appearance of "state endorsement" of religion:

1. School staff cannot influence or select the content of the message that the speaker will deliver;
2. School staff cannot engage in prior review of the speaker's message;
3. A school policy allowing a student message or remarks should use neutral terms and avoid using terms such as prayer, invocation, or benediction; and
4. The message should be non-sectarian and non-proselytizing.

Following these parameters, the Supreme Court's "objective observer" can easily conclude that a student-initiated invocation/benediction is by *student* choice – not by the endorsement or coercion of the school. To insure that an objective observer is not confused, the school can include a disclaimer in the graduation program that informs the audience that views expressed by the students are not those of the school. This comports with the principle of "educat[ing] the audience rather than squelch[ing] the speaker." *Hills*, 329 F.3d at 1055.

The fourth element above deserves special attention. Students should not be required to submit their message for review to determine whether it is "non-sectarian and non-proselytizing." This would inject a degree of school involvement that would likely be impermissible. Simply put, the school should not place itself in the position of controlling student speech in this context.

At least one Circuit has held that a complete ban on prayer in the public context is unconstitutional. *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000). In *Chandler* the court noted that "[t]he Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets." *Id.* at 1316. While no one can legally force a school to allow student-initiated, student-led baccalaureate ceremonies or prayer at graduation, it is unnecessary to eliminate longstanding traditions or the community's desire for such events when they are not encouraged, facilitated or conducted by school officials. *Holloman*, 370 F.3d at 1287. As this memorandum demonstrates, any school may adopt a policy that will comply with the First Amendment, i.e., it may not encourage or discourage student-initiated messages that may contain a religious component. In fact, it would likely be unconstitutional to completely ban private religious expression at graduations.

The fear associated with a lawsuit by anti-religious groups is understandable. But courts across the nation have examined policies containing some or all of the elements listed above and have concluded that student-initiated, student-led graduation prayer and private baccalaureate ceremonies *are* constitutional.[4] Even the Ninth Circuit's negative decision on graduation prayer can be distinguished because the school in that case (1) pre-authorized the invocation (instead of letting the graduates decide); and (2) retained editorial control over the content of the prayer. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102-03 (9th Cir. 2000). A school in the Ninth Circuit may be able to take the simple steps outlined above and avoid the constitutional entanglement that troubled the court in *Cole*.

V. Conclusion

We hope this information has been helpful in understanding students' right to express their religious beliefs during graduation and baccalaureate events and the responsibilities of school officials to permit such activity. If you would like more information or assistance about a particular situation, please contact Alliance Defending Freedom.

[4] *See Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) (en banc); *Chandler*, 230 F.3d at 1313; *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).