



October 3, 2012

Name
Superintendent
West Virginia School District Name
Address
City, WV Zip Code

Re: Pre-Game Traditions at School Sporting Events

As high school football season ramps up at schools across the country, many students, parents, and community members look forward to the rich traditions that accompany it. The pep rallies, the caravans to away games, Friday nights under the lights, and even a pre-game prayer are part of these long-standing traditions at many schools. But the traditional pre-game prayer is experiencing a full assault by groups like Freedom From Religion Foundation (FFRF) and the American Civil Liberties Union (ACLU), which threaten schools with litigation if they do not immediately cease any pre-game prayers. And 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.

It is crucial to note, however, that *the Supreme Court has never said that students are per se forbidden to pray at school sporting events or other events like graduation*. In fact, courts have provided specific guidelines that schools can follow to create a time for a pre-game message where a student can give a message of his or her own choosing, whether secular or religious. All too often, school officials may feel trapped between a “rock and a hard place” when dealing with the First Amendment. We write to provide a legal analysis to assist you in making constitutionally-correct decisions about student speech.

**THE CONSTITUTIONAL RIGHT OF STUDENTS TO ENGAGE
IN RELIGIOUS SPEECH AT 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 squarely 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 hour.” *Id.* at 512. 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 school day.*” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (emphasis added).

School officials often believe (mistakenly) that allowing students to engage in religious speech at school would violate “the separation of church and state” – a doctrine often cited in connection with the Establishment Clause of the First Amendment. This very argument has been *rejected* by the U.S. Supreme Court. In *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226, 249-50 (1990), 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.

While it is true that school-endorsed 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 should not be found to violate the Establishment Clause. *Id.*; *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995). It is our opinion that student-initiated, student-led pre-game messages—including those with a religious message or a prayer—are private student speech. 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).

Furthermore, 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. “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). Any possible misperceptions that the school is “endorsing religion” may be addressed by the school’s ability to insert disclaimers. *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.”).

CRITERIA FOR PRE-GAME MESSAGES

In the school sporting event context, schools can continue to allow a pre-game message where a student delivers a message of his or her own choosing. It is our opinion that the following parameters should prevent any appearance of “state endorsement” of religion:

1. Create a time for a “pre-game message” delivered by a student;
2. The student should be selected through a neutral process (i.e. randomly selected name from a sign-up sheet; rotating among the presidents of student clubs; class officers; etc.)
3. School staff cannot influence or select the content of the message that the speaker

- will deliver;
4. School staff should not engage in prior review of the speaker's message; and
 5. A school policy allowing a student message or remarks should use neutral terms and avoid using terms such as prayer, invocation, or benediction.¹

Following these parameters, the Supreme Court's "objective observer" can easily conclude that a student-initiated message 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 football program or prior to the pre-game message 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.

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. As this memo demonstrates, any school may adopt a policy that is likely to comply with the First Amendment, i.e., a policy that does not encourage or discourage student-initiated messages that may contain a religious component.

The fear associated with a lawsuit by FFRF, ACLU or other like-minded 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 message—that may include a religious message or prayer—that occurs at school events pursuant to such policies is constitutional. *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), *cert. denied*, 508 U.S. 967 (1993). In fact, in a recent case involving the Kanawha School District, the U.S. District Court for the Southern District of West Virginia acknowledged that a policy like the one described above would likely survive constitutional scrutiny.

[T]he policy, unlike that examined by the Supreme Court in *Santa Fe*, did not by its terms invite and encourage religious messages and was not subject to any monitoring by the school....[T]he total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the

¹ In cases involving prayers by legislative bodies, the Fourth Circuit has ruled that to pass constitutional scrutiny, prayers "must strive to be nondenominational so long as that is reasonably possible." *See Joyner v. Forsyth County, N.C.*, 653 F.3d 341, 349 (4th Cir. 2011) ("Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further—prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith—transgress the boundaries of the Establishment Clause"). However, courts have failed to provide specific guidance on what makes a prayer "nondenominational" or "nonsectarian." Because a school official's examination of student's pre-game message to determine if it is "nondenominational" or "nonsectarian" is likely to inject a degree of school involvement that would likely be impermissible, the school should not place itself in the position of controlling student speech in this context.

content of the message [means] that the message delivered, be it secular or sectarian or both, is not state-sponsored.

Deveney v. Bd. of Educ. of Cnty. of Kanawha, 231 F. Supp. 2d 483, 486 (S.D.W.Va. 2002) (quoting *Adler*, 250 F.3d at 1342). The court contrasted a policy like the one we suggest with Kanawha School District's policy which specifically allowed the graduating seniors to decide whether to have an "invocation." Furthermore, "the review by Principal Williams removes any semblance that the invocation is entirely private speech rather than government speech inasmuch as the content of the message is, at least to a degree, regulated by the school." *Id.* at 487-88.

Thus, under current case law, schools could adopt a policy like the one we describe above to allow students to give a pre-game message where the student alone chooses its content. If the student chooses to lead a cheer, read a poem, or even say a prayer, it should be considered the student's speech, not the school's.

If your school district is interested in adopting such a policy, please contact me at 770-339-0774 so that we can further discuss the best method for implementing a time for a pre-game student message at sporting events. We hope that you will take a stand to preserve the constitutionally protected rights of students to engage in student-initiated, student-led speech at school sporting events.

Cordially,



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