



MEMORANDUM

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Student Rights at Graduation/School Events

The First Amendment applies to public middle, high school, and college graduation ceremonies. The ACLJ has put together this resource to address questions and concerns you may have regarding the use of school facilities for religious baccalaureate ceremonies, religious content within speeches given by valedictorians and salutatorians, and organized prayer at graduation ceremonies.

The ACLJ actively addresses issues regarding the use of school facilities for religious baccalaureate ceremonies and religious content within speeches given by valedictorians and salutatorians.

Privately sponsored religious Baccalaureate services are protected by the First Amendment. In addition, student speakers at official graduation events may not be prohibited from expressing a religious viewpoint, but in some jurisdictions, courts have held that students may not use sectarian or proselytizing language.

Are religious Baccalaureate services constitutionally permissible?

Yes. Students, community groups, area churches, and other private individuals are entitled to sponsor events such as religious baccalaureate services. If the school district has a policy of allowing its facilities to be used by outside groups, it may not prevent a community or student group from using the facilities for the purposes of having a religious baccalaureate service. The school district, however, cannot *sponsor* such services.

The Supreme Court's first analysis of graduation prayer came in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the court held that school officials violated the Establishment Clause by inviting clergy to give prayers at a graduation commencement. *Id.* It is important to note, however, that the *Lee* court clearly limited its decision to the particular fact that the school organized the prayer at the graduation ceremony. *Id.* at 629 (Souter, J., concurring).

In *Lee*, Justice Souter noted that religious students may “organize a privately sponsored baccalaureate if they desire the company of like-minded students.” *Id.* Moreover, if a public school district rents its facilities to non-school groups during non-school hours, then the district must rent to religious groups such as the organizers of a religious baccalaureate service. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (invalidating a school district policy that opened school facilities to outside community uses, but excluded religious uses); *see also Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). A policy of equal access for private religious speech conveys a message “of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school’s campus was required by the Equal Access Act (“EAA”) and that the EAA did not violate the Establishment Clause).

It is important to note, however, that school districts may not control or sponsor religious baccalaureate services. *See, e.g., Verbena United Methodist Church v. Chilton Cnty. Bd. of Educ.*, 765 F. Supp. 704, 714 (M.D. Ala. 1991) (allowing a church to “rent and use the high school auditorium to conduct a church-sponsored baccalaureate service would not automatically or necessarily represent an endorsement of religion and therefore violate the establishment clause,” but the Establishment Clause required the school to disassociate itself from the service); *Allen v. Sch. Bd. for Santa Rosa Cnty.*, 782 F. Supp. 2d 1304, 1327 (N.D. Fla. 2011) (stating that “[a] private religious service is not a school event, even if it takes place in rented school facilities” and enjoining enforcement of a school policy broad enough to chill school officials and teachers’ attendance at or participation in private or religious baccalaureate ceremonies). According to U.S. Department of Education guidelines,

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.

Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003).

Are valedictorians and salutatorians permitted to make religious remarks as a part of their speeches?

Yes, although such remarks must be “non-proselytizing” and “non-sectarian” in some jurisdictions.

When a school selects a student to speak at graduation through neutral, even-handed criteria (*e.g.*, valedictorians or salutatorians selected to speak due to their grade point averages), and the student is given primary control of the content of the speech, such expression should not be limited due to its religious content. One Guideline issued by the U.S. Department of Education in 2003 that directly deals with this issue is entitled “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.* To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker’s and not the school’s.

Id. (emphasis added). Thus, valedictorians and salutatorians should be able to include religious content in their speeches, at least where they “retain primary control over the content of their expression,” because they are selected on the basis of neutral criteria.

The *key* question regarding speeches provided by valedictorians and salutatorians at graduations is whether such expression would be viewed as bearing the approval of the school and, if so, whether regulations of such expression are required to be viewpoint neutral.¹ In the

absence of a controlling opinion on these issues in a particular jurisdiction, graduation speeches by valedictorians and salutatorians should be reasonably understood as *the student's own expression* rather than speech controlled or sponsored by the school. A reasonable person in attendance at a graduation ceremony understands that valedictorians and salutatorians are selected due to academic criteria and their remarks typically reflect their own views. Valedictorians and salutatorians should be able to share how their faith has impacted their lives without fear of censorship by school officials.

A related issue is whether public schools may (or must) require that student speakers refrain from including “sectarian” or “proselytizing” religious speech in their graduation addresses. In *Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000)—applicable in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington—the Ninth Circuit held that the Establishment Clause requires school officials to ensure that student speakers at graduation ceremonies do not include “sectarian” or “proselytizing” comments in their speeches. A co-valedictorian composed a speech which included many “proselytizing and religious references to Jesus” and encouraged members of the audience to accept God in their lives. *Id.* at 1096–97. The school principal, who reviewed all student speeches to be given at graduation, forbade the student from delivering the speech as written and instructed him to purge “sectarian” and “proselytizing” language. The Ninth Circuit held that the Establishment Clause required the school to ensure that sectarian speech and prayer were not part of the graduation ceremonies. *Id.* at 1101. In reaching this decision, the court found the school’s “plenary control over the graduation ceremony, especially student speech,” to be significant. *Id.* at 1103.

Moreover, in *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003), the Ninth Circuit applied *Cole* and held that a public school could not allow a co-salutatorian to include sectarian or proselytizing remarks in his speech *even if a disclaimer was included*. The student drafted a speech that “quoted extensively from the Bible” and was intended to encourage other students to accept Christ. *Id.* at 981. The school “advised [the student] that *references to God as they related to [his] own beliefs were permissible*, but that proselytizing comments were not.” *Id.* (emphasis added). The school allowed the student to retain “several personal references to his religion” in his speech. *Id.* The Ninth Circuit held that the school’s actions were required by the Establishment Clause due to the control that the school exercised over the graduation ceremony. *Id.* at 984.

In sum, even in states within the Ninth Circuit, the First Amendment does not prohibit valedictorians and salutatorians from including references to God as they relate to their own beliefs in their speeches in a non-proselytizing manner.

Conclusion

The Supreme Court's decisions have left open several issues regarding religious expression at graduation events that lower courts have addressed in a variety of ways. Principals and school boards will look to lower court opinions in their jurisdictions (if any) that deal with these issues for guidance. Thus, specific restrictions on free speech may vary between jurisdictions. At the most basic level, however, schools may not restrict students' speech based on the students' religious viewpoint. Under current law in some jurisdictions, schools may prohibit a valedictorian from using sectarian or proselytizing language during a graduation speech.

¹ The Second, Third, Ninth, and Eleventh Circuits have required viewpoint neutrality for school-sponsored speech. *See, e.g.,* *Peck v. Baldwinsville Central Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005) (court remanded case to district court to determine whether school officials' decision to cover religious content in elementary student poster was viewpoint neutral under *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1984)); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 98–99 (3d Cir. 2009) (applying a viewpoint-neutrality analysis to an elementary school-sponsored show-and-tell event but finding no viewpoint discrimination); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) (holding that in cases of “school-sponsored or imprimatur speech in a nonpublic forum,” the court was “compelled [by circuit precedent] to review [the school’s] actions through a viewpoint neutrality microscope”); *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1215 (11th Cir. 2004) (agreeing with the appellant that “although *Hazelwood* permits subject-matter-based restrictions on school-sponsored student expression, it does not . . . allow a school to censor school-sponsored speech based on viewpoint”). Conversely, the First and Tenth Circuits have held that viewpoint neutrality is *not* required with regard to government-controlled or sponsored speech, at least in some circumstances. *See, e.g.,* *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (holding that a school could exclude, *inter alia*, religious symbols from a tile project permanently affixed to school hallways because the project bore imprimatur of the school where the school asserted reasonable pedagogical concerns after school shooting tragedy); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (holding that a teacher’s classroom speech was subject to restrictions reasonably related to pedagogical concerns which were not subject to viewpoint neutrality).