



MEMORANDUM

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Below is a short legal analysis prepared by ACLJ attorneys on prayer in school.

Prayer in School

Prayer by Students

The ACLJ supports the right of students (and in many instances, parents and teachers) to gather on public school campuses to exercise their constitutionally protected right to free speech and religion through prayer.

As the Supreme Court has held, “[N]othing in the Constitution . . . 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). The ACLJ is committed to protecting the constitutionally guaranteed right of public school students to pray.

The First Amendment to the United States Constitution protects a student’s freedom of speech, freedom of expression and freedom of religion. However, many school officials mistakenly believe that student prayer inside the public schoolhouse violates the Establishment Clause’s so-called “separation of church and state.” That is simply not the case. “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.” *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

The case-law regarding the First Amendment rights of students is well established. Students’ speech cannot be restricted solely because of the content of that speech. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). It is well settled that religious speech, which includes prayer and worship, is protected by the First Amendment of the Constitution. *Id.* at 268-69. The Supreme Court has also made it clear that “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.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). Accordingly, a public school may not suppress or exclude private student speech for the sole reason that the speech contains a religious perspective. *Widmar*, 454

U.S. at 269-70.

It is imperative that school officials respect the rights of students to express their private religious views and understand the boundaries of their authority and obligations. In view of that, it is essential to understand “[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.” *Mergens*, 496 U.S. at 248 (plurality) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

The Supreme Court has directly affirmed that public school students have the right to discuss religious beliefs, and even share religious materials, with their peers between classes, at break, at lunch, and before and after school, anywhere on school grounds where students have a right to be. *Tinker*, 393 U.S. at 512-13. Schools can only prohibit protected speech by students when it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.” *Id.* at 505-12.

Accordingly, the First Amendment precludes any governmental effort to single out and censor or otherwise burden the speech of private parties solely because that speech is religious.

Although public school officials may not promote or initiate student prayer or require unwilling students to participate in prayer, they may support and give official recognition to this nation’s collective religious heritage without risking a violation of the Establishment Clause. *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

Prayer at Graduation Ceremonies

Important questions arise when it comes to whether students can have student-led prayer at graduation or other school events. The answer depends to a large extent on the particular circumstances of the prayer and the event.

In *Lee v. Weisman*, the Supreme Court held that school officials violated the Establishment Clause by inviting clergy to give prayers at a graduation commencement, but the Court clearly limited its decision to the particular facts that the school organized the prayer at the graduation ceremony. 505 U.S. 577 (1992). Similarly, in *Santa Fe Indep. Sch. Dist. v. Doe*, the Court concluded that the Establishment Clause prohibits school officials from facilitating prayer at school functions such as school football games. 530 U.S. 290 (2000). However, in its decision in *Santa Fe*, the Court specifically noted that not every instance in which a religious message or invocation is offered during a school event will violate the Establishment Clause. *Id.*, 530 at 302 (“[A]n individual's contribution to a government-created forum was not government speech.”).

Nevertheless, *Lee* and *Santa Fe* do not stand for the proposition that *all* student-led religious speech at graduation and related events is unconstitutional. In *Lee*, Justice Souter noted that religious students may “organize a privately sponsored baccalaureate if they desire the company of like-minded students.” *Lee*, 505 U.S. at 629 (Souter, J., concurring). Moreover, in *Santa Fe*, the Court explained that voluntary prayer is permissible “at any time before, during, or after the school day.” *Santa Fe*, 530 U.S. at 313.

In January 2020, the U.S. Department of Education issued updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.¹ This guidance summarizes the state of the law as it relates to the religious expression of students while at school and provides guidance for schools and students alike on this issue.

Where schools permit student expression on the basis of genuinely content-neutral criteria, and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the State and may not be restricted because of its religious content.²

At the core, these guidelines remind schools that “[a]s the Supreme Court has explained, ‘the proposition that schools do not endorse everything they fail to censor is not complicated,’ and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.”³

See You At The Pole and Bible Clubs

Students

See You at the Pole is a student-initiated and led prayer movement in which students from elementary schools to colleges gather around their school flagpole to pray on the fourth Wednesday of September. The Supreme Court has consistently upheld the students’ right to express themselves on public school campuses, even within group contexts similar to *See You at the Pole*, stating that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. Student prayer, including prayer at *See You at the Pole* events, is a protected form of speech that school officials may not ban.

In *Mergens*, the Supreme Court upheld the Equal Access Act and ruled that Bible clubs and prayer groups have the right to meet on public secondary school campuses that receive federal funding during non-instructional time to the same extent that any other non-curricular clubs are permitted to meet on campus. 496 U.S. at 247. Thus, if such federally funded schools permit non-curricular clubs such as Interact, Zonta, 4-H, Chess Club, and other service-type clubs to meet and hold events on campus, those schools must also permit *See You at the Pole* events to the same extent. This principle is clearly laid out by the first section of the Equal Access Act. This law states that:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open public forum on the basis of the religious . . . content of the speech at such meetings.

¹ *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, U.S. DEPT. OF EDUC. (Jan. 16, 2020),

https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

² *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

³ *Id.* (citing *Mergens*, 496 U.S. at 250 (plurality op.); *Rosenberger*, 515 U.S. at 845-46; *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)).

20 U.S.C. § 4071(a) (1984). This protects voluntary, student-initiated, prayer groups that meet on public-school property. *Id.* § 4071(c)(1).

So long as a student's conduct does not "materially and substantially interfere with [school discipline]," *Tinker*, 393 U.S. at 505 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)), students may gather on campus for prayer even if no Bible Club has been officially recognized. Public school students may also bring Bibles, wear Christian t-shirts, and even share their faith, including passing out pamphlets and tracts about Christ to peers on campus. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108–09 (1942) ("This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.").

Moreover, the U.S. Department of Education requires every public school that receives federal funding to certify "that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools," including "'see you at the pole' gatherings before school."⁴

School officials, however, may impose reasonable, non-discriminatory regulations that govern the time, place, and manner of student activities. *See, e.g., Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) (Government "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech."). Such regulations cannot target the religious content of the student activity, unless they are narrowly tailored to serve a significant government interest, and are required to leave open other alternative forms of communication. *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

Teachers

While teachers, like their students, do not "shed their constitutional rights . . . at the schoolhouse gate," they do represent the school when in the classroom or at school-sponsored events and, therefore, should take care to avoid Establishment Clause violations. *Tinker*, 393 U.S. at 506. Thus, teachers, in their capacity as school officials, may not actively participate in, lead, or discourage a student religious meeting. *See 20 U.S.C. § 4071(c) (3)*. To determine if a teacher has a right to attend events such as *See You at the Pole*, several factors, including the time of day and manner of participation, must be taken into consideration. If the event occurs during "non-contract" time, teachers should be able to participate in the event without violating the Establishment Clause so long as they make it very clear that they are present in their roles as citizens rather than in their official capacities. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425.

Parents

Parents and other adults should be allowed to participate in *See You at the Pole* events to the same extent that adults may attend on-campus events held by other student groups. *See, e.g., Gold v. Wilson Cnty. Sch. Bd. of Educ.*, 632 F. Supp. 2d 771 (M.D. Tenn. 2009) (court ruled in favor of

⁴ *Id.*

parents on their motion for preliminary injunction where school censored *See You at the Pole* posters). The school opened a limited public forum for those “who wish to advertise events pertinent to students’ interests,” and school’s exclusion of religious messages “stifled religious speech . . . [and] were neither reasonable nor viewpoint neutral.” *Id.* at 788, 792. However, as schools are usually granted broad discretion to develop school visitor policies so long as they do not discriminate on the basis of religion, parents should be sure to become familiar with and comply with those school policies.

The American Center for Law and Justice has been in the vanguard of protecting the religious liberties of public school students and their families. Over the years, ACLJ attorneys have won countless cases where school officials have, out of ignorance or hostility, attempted to violate the First Amendment rights of public school students. Whether the case involves the discriminatory treatment of a student Bible Club, or the refusal to allow a kindergartner to pray before eating her lunch, ACLJ attorneys work continually to educate public school officials about student rights. Because of our commitment, we are available to answer any questions you might have concerning this matter. Please feel free to share this information with your local government officials, school officials, and others in your community.

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