

## **LEGAL DIRECTIVES FOR SCHOOL BOARD MEMBERS (MOTIVATION FOR ENACTING MODEL POLICY)**

The motivations of ordinary citizens for desiring their schools to adopt or reject student speaker policies are irrelevant to whether the ultimate enacted policies are constitutional. Ordinary citizens (i.e., students, parents, pastors and others who are not school officials) are free to argue that they want student speaker policies enacted because they hope that a student might decide to pray at some event. Likewise, ordinary citizens are also free to argue that they oppose student speaker policies because they do not want even the possibility that a student might pray at some event (and would rather no student be allowed to speak so as to avoid even the possibility that a student might pray).

School officials, on the other hand, may not be officially motivated by either of these arguments and are legally prohibited from advancing or considering either. Whether or not a student would ever use a speaking opportunity for prayerful speech, as opposed to similar secular or other speech, is speculation regarding which the school board must not indulge and which must not be interjected into discussions and considerations among school officials (since school officials are required to be neutral in matters of religion).

It would be just as unconstitutional for a school board to reject a student speaker policy for the purpose of preventing prayer as it would be for the same school board to adopt a student speaker policy for the purpose of instigating prayer. These actions would represent the two extremes of the same unconstitutional governmental non-neutrality. In the first instance, the impermissible governmental purpose would be to discourage and prohibit the free exercise of religion, violating the Free Exercise and Free Speech Clauses, and in the second instance the impermissible governmental purpose would be to encourage and establish religion, violating the Establishment Clause.

The first two clauses of the First Amendment to the United States Constitution state: Congress [a term interpreted to include school districts and school officials] shall make no law [a term interpreted to include school policies and practices] respecting an establishment or religion, or prohibiting the free exercise thereof." A school board member's support for a student speaker policy must be based on secular (not religious or pro-prayer) grounds. Likewise, a school board member's opposition to a student speaker policy must be based on secular (not anti-religious or anti-prayer) grounds.

Thus, each board member must vote based upon whether or not he or she believes that worthy educational purposes and goals can likely be advanced by enacting policies providing students with speaking opportunities and giving students additional avenues for participating in their school's activities. This should be the focus of the discussions and decision making process.

Why the drastic difference between what ordinary citizens can do as contrasted to what school board members can do? Because the First Amendment of the Constitution applies only to what government officials (school board members, superintendents, teachers, coaches, and the like) may or may not do in their official capacities. The First

Amendment does not to apply to actions of ordinary citizens. The Constitution does not prohibit individual citizens from doing acts that tend either to establish or discourage religion. Only the government and government officials are required to be neutral on the topic or religion while acting in official governmental capacities.

Thus, non-government citizens may talk all they want about how they support or oppose prayer, but school board members must avoid doing so and avoid making this an official consideration in their deliberations and decisions.

Any school board meeting set to consider the issue of student speaker policies will likely draw those who wish to speak for or against "prayer" rather than secular reasons for adopting or rejecting student speaker policies. The district should therefore take affirmative steps to protect itself from unfounded accusations later that the district has based its decisions upon such religious or anti-religious arguments. At the beginning of the meeting, the district should read a prepared disclaimer that makes clear that the school district is not legally allowed to act with a religious or anti-religious purpose and shall not do so:

"As citizens who address the board, you are free to express your views on religious subjects, the existence or non-existence of a Supreme Being, and any other matter on which you wish to address the school board. All citizens should feel free to share their views and concerns with their elected officials. School officials (including the superintendent and school board members), however, are legally prohibited from acting with a purpose to either encourage or discourage religion or religious expression. The school district, superintendent, and school board, must act, and will act, with strict neutrality regarding matters of religion, will not act with a religious or anti-religious purpose in considering and deciding matters that come before the board, and will make decisions based wholly upon secular considerations, as required by law."