

## **PITFALLS & PERAMETERS FOR SCHOOL BOARD MEMBERS (MOTIVATION FOR ENACTING MODEL POLICY)**

The motivations of ordinary citizens for desiring their schools to adopt or reject a student speaker policy 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 a student speaker policy 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 a student speaker policy 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 *promoting* 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 a policy providing students with speaking opportunities.

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 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 a student speaker policy will likely draw those who wish to speak for or against "prayer" rather than secular reasons for adopting or rejecting a student speaker policy. The district should therefore take affirmative steps to protect itself from unfounded accusations later that the district has based its decisions upon religious or anti-religious arguments. At the beginning of the meeting, the district should read a prepared disclaimer (and enter it into the official records) that makes clear that the school district is not legally allowed to act with a religious or anti-religious purpose:

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.

Appropriate points of discussion among the school board members should be as follows:

1. As a policy matter, should the school district allow student speakers at any of its school events (including graduations)?
  - a. What are the educational and other secular reasons for prohibiting student speakers at school events?
  - b. What are the educational and other secular reasons for permitting student speakers at school events?
    - i. The opportunity presents educational opportunities for students in the areas of speech, English, grammar, and civics;<sup>1</sup>

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<sup>1</sup> Rather than merely learning *about* speech, English, grammar, and civics, public speaking involves students in the actual *practice and application* of these subjects. Students involved in speaking at events have to organize their thoughts, author, prepare, practice, and deliver a concise oral presentation before a live audience, providing these students with valuable opportunities for learning and application of public speaking and presentation skills. See Emily Shartin, *The Holly Fest: A Time to Speak Clearly*, BOSTON GLOBE, Dec. 7, 2000, at 8 (discussing the benefits of public speaking and how the process and practice of articulating one's thoughts before an audience help high school students in other academic areas and in exam taking), 2000 WL 3358387. These speaking opportunities can be as educational and beneficial as any academic class. It would be wasteful to allow these events and activities to pass week after week without the school utilizing them as opportunities for its students to advance their communicative skills—

- ii. The opportunity gives students experience with speaking in public, organizing their thoughts, and making a concise oral presentation before an audience;
- iii. The opportunity gives students a greater sense of ownership in their school's activities/events through student involvement;
- iv. The opportunity promotes a continuation of student maturity, growth, and education by placing additional responsibilities upon students, and particularly upon older students who are in the final phase of their formal required education;<sup>2</sup>
- v. Introductions of various school events by students provide a method for marking the opening of school events that provide student participation and involvement;<sup>3</sup>
- vi. Introductions of various school events by students provide a method of bringing the audience to order;
- vii. Introductions of various school events by students focus the audience on the purpose of the event;
- viii. In the case of graduations, there are certain students who have earned the right to speak.

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which would surely prove important to them in whatever they choose to do after high school.

<sup>2</sup> School activities obviously exist for the benefit of students, not for the benefit of school officials. High school students in the final stages of their required formal education are already deemed by school districts as being mature enough to run their own student government, elect their own officers and representatives, take college level courses, plan and carry out school events, and organize and lead student clubs. Furthermore, society, in general, believes high school students are mature enough to drive automobiles, and, upon reaching majority age, to vote and, in time of war, to be drafted to fight for our country. The Supreme Court has acknowledged the maturity level of students by the time they reach high school.<sup>2</sup> No compelling reasons exist for school officials or judges to conduct or script the introductions of student activities when students may capably do so themselves. Allowing student participation in this respect provides a logical progression of other responsibilities already entrusted to high school age students and does not put the government in a position of endorsing anything other than student participation, student choice, and the many secular educational benefits of doing so. Allowing such participation sends a message to students that the school district believes them capable, mature, and intelligent enough to handle more responsibilities in connection with student activities.

<sup>3</sup> In public schools, students participate in numerous recurring activities having natural beginnings and endings, such as sporting events, graduations, assemblies, and the school day itself. Just prior to the start of each activity, there is usually noise, walking around, and talking. Attaining attention, silence, and focus normally requires some act to mark the beginning of each occasion. In America, formal ceremonial expressions traditionally have been used to achieve this end. Methods and content vary, but most provide a moment conducive to reflection, focusing, and calming. While ceremonial prayer has been used as a method of opening events, it is certainly not the only method by any means. A moment of silence, reciting a quote, singing the National Anthem or other song, leading the Pledge of Allegiance, offering words of welcome, and various other methods have also been used. A targeted elimination of one method of formalizing the beginning of events simply because it encompasses a faith-based viewpoint is not in keeping with the requirement of “a course of ‘neutrality’ toward religion.” *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793 (1973).

2. If the school district decides that, as a policy matter, the district will not allow any student speakers at any time (including graduations), then there is no need for a student speaker policy (other than a short policy that states, “The district does not permit students to publicly speak at any school event, program, or ceremony”).
3. But, if the school district decides that there is even one time that the school will permit a student to publicly address an audience at a school event (including graduations), then the school district must have a written policy covering student speakers. The school district has written policies addressing most every other conceivable issue, and it certainly needs one addressing this important one. If there is no written policy, it leaves the school district open to law suits. If a student speaker says something that someone does not like, and there is no written policy, then the speech of the student may be attributable to the school district. If suit is filed against the school district to hold the school district responsible for the content of the student’s speech, how will the district defend itself with no written policy in place? It will just be left up to the court to guess, and that is not the legal position that any school district wants to find itself.
4. What should such a written policy state? Is there any guidance available for drafting such a policy? Yes, in 2003, the U.S. Department of Education issued “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools” (“Prayer Guidance”). As a condition to receiving federal funds, each school district in America must annually certify that it “has no policy [that] prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools as set forth in this guidance.” The Prayer Guidance makes it clear that voluntary prayer and other faith-based expression publicly stated by students over school microphones is allowable at student assemblies, extracurricular events, and graduations if an appropriate student speaker policy has been enacted by the school district. Any person can report a school district to the U.S. Department of Education that is out of compliance with the Prayer Guidance. If a school district is found to be out of compliance, it can lose its federal funding (requiring the short-fall to be made up through higher taxes).
5. Has anyone drafted a local policy that takes into account the U.S. Department of Education’s Prayer Guidance? Yes, recognizing that most schools’ lawyers are not constitutional specialists and do not have a clue as to how to draft such a policy, some of the constitutional attorneys who helped the U.S. Department of Education formulate the Prayer Guidance drafted a model policy that translates the Prayer Guidance into a usable local policy for school districts.