GUIDELINES CONCERNING

Religious Activity In The Public Schools

Adopted June 22, 1995
Virginia State Board Of Education

INSIDE

Board Of Education's Guidelines Concerning Religious Activity In The Public Schools

WHEREAS, the 1994 General Assembly enacted Va. Code § 22.1-280.3 requiring the Board of Education, in consultation with the Office of the Attorney General, to develop Guidelines on constitutional rights and restrictions relating to religious expression in our public schools; and

WHEREAS, such Guidelines are not intended to be regulations displacing local discretion and determination, but as technical assistance outlining relevant constitutional and statutory principles for consideration by local school authority; and

WHEREAS, in accordance with Va. Code § 22.1-280.3, the Board of Education provided broad-based opportunity for input from the general public, teachers and local school boards, before establishing Guidelines.

NOW, THEREFORE, BE IT RESOLVED that the Board of Education hereby adopts the attached Guidelines and directs that they be disseminated to the public schools of this Commonwealth and made available for public distribution.

Adopted this 22nd day of June, 1995

James P. Jones
President, Board of Education

William C. Bosher, Jr.
Superintendent of Public Instruction

Board Of Education's Guidelines Concerning Religious Activity In The Public Schools

Introduction

1. These Guidelines are not intended as regulations or state policies displacing local discretion. These Guidelines are designed instead as technical assistance for consideration by local school officials, administrators and teachers in formulating their local policies and decisions. They have been adopted following public hearings throughout the Commonwealth and after opportunity for comment and input from the general public, teachers, school administrators and school boards, parents and students, and interested organizations.

2. These Guidelines do not purport to provide definitive answers to all of the possible issues and the varied circumstances as may exist in the public schools. Indeed, the United States Supreme Court has cautioned that decisions in this area are particularly fact-sensitive. In that regard, local school consideration should also take into account the attached memorandum prepared by the Office of the Attorney General, dated January 9, 1995. That memorandum sets forth the conceptual framework in the law generally applicable and governing in most situations.

Guidelines

3. One can imagine a number of situations in which private individuals might engage in religious expression or practices. They might pray before school, during school, or during extracurricular activities; they might wear religious attire or clothing with a religious message. They might carry the Bible or other sacred texts with them in school; they might attempt to evangelize or proselytize other students. The religious beliefs of some students may cause their parents to request that they be excused from holiday celebrations, holiday pageants, physical education or a curriculum which violate sincerely held religious convictions.

4. The public schools should thoughtfully consider any religious objection to its practices or policies made by parents or students. School authorities should determine whether exemptions or exceptions to their policies and practices can be provided in the interest of reasonably accommodating sincerely held religious beliefs.

Curriculum

5. Students should be excused from school to attend religious services or observe religious holidays. Manifestly, any requested absence must be in conformity with local school procedures, including parental or guardian approval as necessary.

6. The public schools are not required to conform their curriculum to every religious tenet or objection. On the other hand, while the curriculum must not be designed to promote religious belief or non-belief, it need not be sanitized of all religious references or themes which may appear in educational materials. While the precise contours of their rights have not been judicially defined, parents and students also have constitutional rights — at least in some circumstances — to exemption from assignments, materials or programs that substantially burden their religious tenets. Thus, public school authorities should thoughtfully consider whether suitable alternatives are available that would allow students to opt-out of any program in which participation would substantially burden their religious tenets. Where such a burden occurs and public school authorities cannot show a compelling interest in requiring attendance, the student must be allowed to opt-out.[1]

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1 These rights of parents and students are granted in the Free Exercise and Free Speech Clauses of the First and Fourteenth Amendments. The Religious Freedom Restoration Act may also provide similar protection. Opt-out or excusal as an accommodation to free exercise concerns has been looked upon favorably by the courts. West Va. State Bd. of Educ. v. Barnette,

7. As provided by state law, local school boards must excuse from school attendance "any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Virginia law provides however that "bona fide religious training or belief does not include essentially political, sociological or philosophical views or a merely personal moral code." See Va. Code § 22.1-257. Also, Virginia law authorizes home instruction as an alternative to public schooling under certain conditions. See Va. Code § 22.1-254.1. When the requirements of home instruction have been met, instruction of children by their parents in their home is an acceptable form of education under the policy of the Commonwealth of Virginia.

8. School personnel, including teachers, shall not lead their classrooms in devotional exercises whether directly in class or over a public address system.[2] A school official or teacher also shall not ask or designate a student volunteer to lead the class in a devotional exercise.[3]

9. Our United States Supreme Court has however aptly recognized that public education may not be complete without a study of our religious heritage or an objective comparison of our religious pluralism. School Dist. v. Schempp, 374 U.S. 203 (1963). When presented objectively as part of a secular program of education, the public schools may offer courses in comparative religion, study the history of various religions and their relationship to civilization, as well as the historic and literary qualities of religious materials. Religious music may also be included in music classes, religious art may be included in art and humanities classes, the Bible and other religious texts may be studied in literature classes, and literature dealing with religious themes may be used in language arts development. School and classroom libraries may also include books with religious themes.[4] If the school offers a course specifically studying the Bible or other religious texts as literature, the course should be taught like other courses offered at the same grade level. The material must be balanced and objectively taught without attempt to indoctrinate religious belief or non-belief. Teachers of the course should be assigned using objective standards without any religious test.[5] Discussion of religious topics or materials should be relevant to the curriculum and should not occupy a disproportionate amount of classwork. Course work should not include participation in a religious ceremony of any kind during or outside of class.[6] Schools should also be mindful of their students' diversity of religious beliefs.

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319 U.S. 624, 642 (1943); Grove v. Mead Sch. Dist., 753 F.2d 1528, 1533 (9th Cir. 1985) (Despite finding of a free exercise burdens inherent in making child read textbooks which espoused views contrary to her family's faith, no constitutional violation as student was excused from reading offensive book and assigned an alternative book); Smith v. Board of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987) (parents of school'children unsuccessfully challenged the mandatory use of textbooks which contained religiously objectionable references); Mozert v. Hawkins County Bd. of Educ., 827F.2d 1058 (6th Cir. 1987) (requiring students to be simply exposed to objectionable ideas in standard curriculum did not impose substantial burden on religion without proof that the student was required to conform or take some action contrary to their religious belief); Fleischfresser v. Directors of Sch. Dist. 200, 15F.3d 680 (7th Cir. 1994) (dismissing challenge to supplemental reading program which contained offensive references to "witches, giants and sorcerers" and arguably suggested pagan themes).

2 School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

3 B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982).

4 In Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989), a federal court, in refusing to remove a Bible from a public school library stated: "In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library. The Bible is regarded by many to be a major work of literature, history, ethics, theology and philosophy.... To deprive a public school library's collection of the Bible would, in the language of Justice Robert Jackson, render the educational process 'eccentric' and incomplete." Id. at 1513.

5 Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983); Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

6 Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979), finding that student participation in transcendental meditation ("TM") exercise constituted an establishment or religion in violation of the First Amendment.

10. Religious symbols or religious texts, such as the Ten Commandments, may not be posted in the public schools when the purpose or primary effect is to advance religion, but may be posted on a temporary basis as part of an academic lesson or curriculum. The public schools, however, may properly teach students important values, ethics and morality, but not through religious indoctrination. The Ten Commandments, the Bible, as well as other religious materials may be studied for bona fide educational purposes.

Free Time

11. During most of the school day, the attention of students is properly directed toward activities forming part of the school curriculum or co-curriculum. There are, however, other periods of the school day when students are generally free to read on their own, or to gather together and/or talk among themselves about subjects of their own choosing. While such non-instructional periods may vary from school to school, they typically include, but are not necessarily limited to (i) riding to and from the school on the school bus, (ii) a period each morning between the time students are permitted on school grounds and the time they are required to be present in their seats, (iii) lunch time, (iv) recess in the lower grades, and (v) in the upper grades, brief periods between classes.

12. During such free time, students should be free to read religious literature of their own choosing, and to discuss religious themes with other willing students on the same basis as they might discuss secular interests and subjects.

13. Student-initiated and non-disruptive devotional activities during free time, such as "meet me at the pole" events prior to school, should be permitted. Teachers and school officials must not encourage or discourage participation by students in such events. The public schools however have the right and responsibility to protect public property and preserve order and determine the school facilities and permissible locations authorized for such activity. Such decisions should be made and applied evenly without favoring or discriminating against the activity solely because of its religious nature.

14. Similarly, if a school conducts a study period or provides other times in which students are allowed to read materials other than those prescribed by the school curriculum, the students must be free to read religious material, not just secular material.

Student Dress

15. Students will sometimes express their religious convictions on their clothing or personal effects. For example, a Christian girl may wear a necklace bearing a cross, while a Jewish girl may wear a necklace displaying a Star of David. Students may also wear T-shirts bearing religious messages.

16. In the absence of disruption to school activities, obscenity or lewdness, these and other expressions of belief will generally constitute protected speech. Public school personnel may not discipline students because they disagree with the underlying message, but may take reasonable action needed to promote order and address any disruptive effects of such student speech. A school may adopt a content-neutral dress code that uniformly prohibits certain kinds of clothing altogether; provided, a dress code does not single out or discriminate against religious expression. For example, schools may determine that T-shirts are not appropriate attire and apply the policy evenhandedly to all such apparel. Schools should attempt, however, to accommodate student's religious attire as well as religiously based modesty concerns (e.g. in physical education classes).

Student Assignments

17. Student art projects often center around seasonal themes. Where the season has both secular and religious connotations, some students may prefer to depict a secular aspect of the season, while others may prefer to depict a religious aspect.

18. So long as the expression is germane to the assignment, teachers should not discriminate against students who prefer a religious theme or viewpoint over a secular one (or vice versa). Example: Where different students depict a manger scene, a menorah and "Frosty the Snowman," the teacher may display them all on an equal basis, or on the basis of their artistic merit, but may not discriminate in favor or against any of them on the basis of the religiosity or secularity of their themes. Students have a right to express their religious values and viewpoints in their classwork, assignments and work products to the same degree that students may express secular viewpoints. A student's grade or evaluation must never be affected by his or her creed or religious belief or non-belief.

Distributions of Religious Literature

19. Students should be permitted to distribute religious material during school on the same or equal basis as non-religious material. Rivera v. East Otero Sch. Dist., 721F.Supp. 1189 (Colo. 1989) (peaceful student distributions of religious literature at school protected by the First Amendment). The schools may however reasonably regulate the time, place and manner of such distribution. Hedges v. Wauconda Comm. Sch. Dist., 9 F.3d 1295 (7th Cir. 1993). (Merely permitting an eighth grader to distribute religious literature to peers before class without disruption did not raise Establishment Clause concerns).

20. Schools should not grant community groups or individuals from outside the school special access to the students during the school day for purposes of proselytizing or distributing proselytizing literature to students. See, e.g., Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir.), cert. denied, 113 S. Ct. 2344, 124L. Ed.2d 254 (1993). A long line of Supreme Court precedents establish that it is impermissible for school officials to allow the machinery of the state to be used to provide an audience for religious exercises or instruction by outside groups. See Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962). In disapproving access to students by religious organizations, the Court, in McCollum, stated that:

> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery.

333 U.S. at 212.

21. Community groups have no right to enter the school grounds to distribute materials to students during the school day. Where the school elects to allow such distribution by some community groups for noncurriculum purposes, the law is still developing with regard to affording equal access to community groups to distribute religious materials in the public schools. Policy in this area should consider the manner, time and location of the distribution and whether there is risk that impressionable children will perceive official school endorsement of the material.[7]

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7 See Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994), petition for cert. filed, No. 94-1299, 63USLW 3583 (January 26, 1995) (school district engaged in viewpoint discrimination by denying access to a religious community group meeting with students after school, while permitting an allegedly nonreligious community group to meet with students on the same topics); Sherman v. Community Consol. Sch. Dist. 21, 8 F.3d 1160 (7th Cir. 1993) (no establishment clause violation when school division allowed the Boy Scouts, which requires all members to affirm belief in God, to use elementary school facilities for meetings and to distribute flyers and posters through the school); Schanou v. Lancaster County Sch. Dist., 863 F. Supp. 1048 (D. Neb. 1994) (Gideons permitted to distribute Bibles after school to students on sidewalks on school property where other groups also allowed to distribute their literature).

Holidays

22. Public schools have traditionally acknowledged a wide variety of holidays, some with religious origins and significance. Teachers and students typically prepare displays, study the origin of holidays and participate in plays or concerts. Administrators and teachers should fundamentally be sensitive to "inclusion" not "exclusion" of students holding diverse religious viewpoints.

23. A public school may recognize holidays also having religious significance to some (e.g., Christmas and Easter). While these holidays have religious origins and retain a religious significance, they have also become part of our national culture and heritage. The religious significance should not, however, be promoted or sponsored. Case law suggests that context can be important to assure fair balance and sensitivity to all students. A musical program consisting solely of religious music, for example, is more problematic than a program that combines religious and secular music. See R.J.J. v. Shineman, 658 S.W.2d 910, 913 (Mo. Ct. App. 1983) (winter holiday concert constitutional where seasonal numbers such as "Jingle Bells" performed along with Christmas carols). See also County of Allegheny v. ACLU, 492 U.S. 573 (1989) (display of menorah next to Christmas tree acceptable whereas display of creche alone unacceptable); Lynch v. Donnelly, 465 U.S. 668, at 680 (1984) (context of creche display critical). Moreover, public school personnel should be animated by secular motives or goals — not by a desire to subtly indoctrinate.

24. A school may also teach its students objectively about religious holidays, including their religious significance, without offending the Establishment Clause when presented as part of a secular education program. Florey v. Sioux Falls Sch. Dist., 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980). In Florey, the court upheld a school's holiday policy, noting that it is constitutionally permissible for a school to "advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization." Id. at 1314 (quoting policy). See also Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993) which considered the constitutionality of a school board's policy regarding "the use of cultural, ethnic, or religious themes in our educational program." Id. at 932. The court upheld the policy for a variety of reasons, observing that "the use of appropriate classroom and central displays is clearly a recognized and legitimate educational technique." Id. at 939.

25. Any student should always be permitted to opt out of holiday-related events and programs because of strongly held religious sentiments.

26. Devotional or strictly religious exercises must be avoided.

27. Whenever feasible, schools should strive to avoid scheduling exams and special events on days when it is foreseeable that some students will be absent to celebrate religious holidays. Similarly, if a school gives awards for perfect attendance, it should not withhold such recognition from students whose only absence is necessitated by holidays where observance is prescribed by the student's faith.

The Equal Access Act

> *[The Equal Access Act] means that the school will*
> *have the same regulations for a religious club*
> *as for any other club, no more, no less.*
>
> Senator Mark Hatfield

28. School officials should be familiar with the federal Equal Access Act (20 U.S.C.S. § 4071, et seq.). The Act guarantees, under certain circumstances, student religious and Bible study groups equal access and opportunity to conduct meetings in the secondary public schools on the same basis as other noncurriculum related student groups. See Attorney General's attached memorandum. Congress' primary purpose in passing the Act, according to the Supreme Court, was to end "perceived widespread discrimination against

religious speech in public schools." Mergens, 496 U.S. 226, 239 (1990). While Congress recognized the constitutional prohibition on governmental promotion of religion, it also believed that nonschool-sponsored student speech, including religious speech, should not be excised from the school environment.

29. There are three basic Guidelines under the Equal Access Act:

30. The first is nondiscrimination. If a public secondary school permits student groups to meet for student-initiated activities not directly related to the school curriculum (such as chess club, ski club, scuba club, etc.), it is required to provide equal access on the same basis to religious groups. The school cannot discriminate against any students conducting such meetings on the basis of the religious, political, philosophical, or other content of the speech at such meetings. Religious speech and expression are to receive equal treatment.

31. The second basic concept is protection of student-initiated and student-led meetings. Student-initiated means that the students themselves, without influence or promotion by school personnel, seek to meet and that the students will direct and control the religious discussion without governmental participation.

32. The third basic concept is local control. The public schools may apply content-neutral disciplinary rules to avoid disruption, or reasonably regulate the time, place and manner of such meetings. For instance, a school may establish a reasonable time period for meetings on any one school day, a combination of days or all school days. It may assign rooms, and enforce student discipline codes.

33. To comply with constitutional and statutory law, the public schools must allow religious student groups equal access to meeting room facilities and other locations at school as made available to noncurriculum student groups. Similarly, religious student groups should have equal access to facilities made available to noncurriculum student groups to announce their meetings. These may include, for example, the student newspaper, bulletin boards, the public address system and club fairs. Where a religious group is the first noncurriculum group to apply for such access, the school may allow such group access provided that it adopts a policy that would also allow non-religious noncurriculum groups equal access. The right of a lawful, orderly student group to meet, however, cannot depend on the approval of other students and cannot be denied because other students object to their access. A student group should not be denied equal access merely because its views are unpopular.

34. Public school authority may also not retaliate against any student or teacher because of his or her association with a religious organization.

Teacher Expression of Religion

35. As public employees, and agents of the public schools, the speech rights of teachers are not absolute and must be balanced against the school's legitimate right and duty to maintain order, perform its obligations to the population served, and avoid government sponsorship of religion. Teachers must be cognizant of their great influence in shaping student values and their overarching duty not to use their position to indoctrinate students into their religious beliefs or lack thereof.

36. As a general matter, neither the Free Exercise nor Free Speech clauses provide teachers an unqualified right to engage in religious expression with students at school. Because teachers play a central role in setting values for our children, they must also bear responsibility for their actions which impermissibly create a danger of establishing religion in the public schools, including misapprehension by pupils that the public schools sponsor the teacher's viewpoint. Teachers should not lead students in devotional activities during class or school-sponsored activity, or encourage students to participate with the teacher in religious activity before or after school. A teacher who wishes to participate in voluntary student, religious activity during free time should be careful that his or her participation is not misinterpreted by students as official sponsorship of religious belief. The circumstances of each case, including the maturity of the students and the context and duration of the event must be professionally considered.

37. A teacher may respond honestly, in a noncoercive, and nonindoctrinating manner, to student-initiated inquiries about religion, just as a teacher may respond in an appropriate manner to student inquiries about political, philosophical or other secular interests. Balance, degree and fairness are important considerations, and the specific question may best be answered by referring the student to his or her parents.

38. Teachers should be able to meet with other teachers for private religious speech, including prayer, meditation and reading of religious materials, during their free time, such as immediately before or after class or during breaks or lunch. As professionals, teachers need to be careful however that their actions are not misinterpreted by students.

Moments of Silence

39. The Code of Virginia (§ 22.1-203) authorizes the school board of each school division to establish the daily observance of one minute of silence in each classroom of the division. In establishing policy, the school board must be careful that its policy is animated by secular justifications, not merely as a pretense to encourage prayer.[8] Public schools may provide students, for example, with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. A brief minute of silence may also fulfill other secular objectives, including maintenance of discipline.

40. The teacher must ensure that all pupils remain seated and silent and make no distracting display to the end that each pupil in the exercise of his or her individual choice and consistent with freedom of conscience, may engage in any silent activity (including prayer) which does not interfere with, distract, or impede other pupils in the like exercise of individual choice. The teacher may say the following, for example, before stipulating a minute of silence: "We will now observe a minute of silence. You may, in the exercise of your individual choice, meditate, pray or engage in any other silent activity which does not interfere with, distract, or impede other pupils. You must remain seated and silent."[9]

41. The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. The teacher should also not use the time to pray aloud in front of other students, nor permit any other student, or group of students, to pray aloud.

Graduation Prayer

School Initiated Prayer, Class Initiated Prayer

42. It is firmly settled in the law that the Establishment Clause forbids school-sponsored prayer or religious indoctrination, as well as any school initiative designed to endorse prayer generally or sponsor a particular religious viewpoint. In 1992, the United States Supreme Court held in Lee v. Weisman, 112 S. Ct. 2649, 120 L.Ed. 2d 467 (1992), that school sponsored prayer, even nonsectarian and nonproselytizing prayer, at graduation ceremonies violated the Establishment Clause.

43. In Weisman, the participation and involvement of school personnel was pervasive in deciding whether there would be a religious invocation, selecting the speaker and even dictating the contents of the invocation

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8 Cf. Wallace v. Jaffree, 472 U.S. 38 (1985); Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (S.D. W. Va. 1985). In Jaffree, Alabama's moment of silence statute was invalidated by the U.S. Supreme Court, partly because legislative record evidenced primarily religious, rather than secular purpose. Virginia's statute can be defended as promoting lawful goals, and not simply to endorse religion. Care must be taken that it is administered neutrally.

9 This language is drawn from §22.1-203 of the Code of Virginia.

through a pamphlet setting forth guidelinerLfor "nonsectarian" prayer. In deciding that such pervasive involvement by school personnel was unconstitutional, a divided Court (5-4) remarked:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory.

112S.Ct. at 2655, 120L.Ed.2d at 480.

44. The Court was concerned not only with the pervasive degree of school participation in religious matters, but also with the resulting subtle coercive pressures that accompany any official religious observance as part of a school-sponsored event. The argument that the ceremony was "voluntary" was rejected by the majority over the objections of the dissenting Justices. Even though objecting students were not required to attend graduation to receive their diplomas, such attendance was "in a fair and real sense obligatory." Id. at 2655, 120 L. Ed. 2d at 480. As the Court observed:

> Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions.... Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id. at 2659, 120 L. Ed. 2d at 486.

45. Nothing in Weisman would prohibit students from themselves organizing a privately sponsored baccalaureate service before or following the graduation ceremony off the school grounds. See 112 S.Ct. at 2677, 120 L. Ed. 2d at 508.

46. Devotional exercises at school sponsored events do not become constitutional simply by excusing objecting students from attendance.

47. The decision in Weisman has produced a split in the lower courts over the constitutionality of class-initiated, student led prayer at graduation ceremonies. This issue will necessarily be uncertain in the law until resolved by the United States Supreme Court. For example, a federal appeals court in Texas approved a school board's policy allowing graduation prayer where a majority of the graduating class voted for "neutral" prayer by a student volunteer. Jones v. Clear Creek Indep. Sch. Dist., 977 F. 2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993). In Jones, unlike Weisman, school personnel neither made the decision to include a religious invocation or to supervise the delivery and preparation. They merely abided by the collective decision of the senior class, as expressed through a vote. The Fifth Circuit reasoned that the Establishment Clause is a restraint on government and not when prayer is "the result of student, not government choice." Id. at 968. Other lower courts have used reasoning similar to the Fifth Circuit's.[10] However, there is also a substantial body of case authority to the contrary, including a decision by the Ninth Circuit that rejected the rationale in Jones and reached the opposite result, holding that when school officials "delegate" a decision on prayer to a vote of the senior class, the resulting election in favor of prayer is still state-action. Harris v. Joint Sch. Dist. No. 241, 41 F. 3d 447 (9th Cir. Nov. 18, 1994). A similar result was reached by a federal district court enjoining the Loudoun County public schools from permitting student led and initiated prayer at graduation

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10 Steinv. Plainwell Community Schs., 822 F. 2d 1406 (6th Cir. 1987) (validating nonsectarian student led and initiated invocation); Adler v. Duvall Co. Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994), argued orally, #94-2638 (11th Cir. March 7, 1995); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991) (finding that religious invocation was ceremonial in nature without evidence of coercion); and Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974) (holding that brief nonsectarian prayer did not substantially burden religious liberty).

ceremonies. See Gearonv. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993) (declaring that organized prayer at a high school graduation is inherently divisive and unconstitutional no matter who inspires and delivers the invocation).[11] Only the Loudoun County public schools are bound by Gearon.[12]

48. The Supreme Court has not decided a case presenting the specific question whether religious invocations may be permitted when they result solely from a decision by the senior class through some electoral mechanism.[13] School divisions considering such policy should review existing case authority with legal counsel. Consideration includes: (1) the degree of governmental participation and oversight locally desired, (2) whether the activity results in any coercive pressure from teachers or peers on objecting students to participate at the expense of forfeiting benefits, (3) whether the activity is animated primarily by secular purposes,[14] and (4) whether the circumstances will suggest appearances of a school imprimatur, such as, for example, promotional statements in official publications or announcements. The test may very well be whether the activity, in practical effect, creates an impermissible appearance to a reasonable person that the public schools are supporting a religious perspective or viewpoint. Even in Jones, the court hastened to acknowledge that "we understand government to unconstitutionally endorse religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices." Jones, 977 F. 2d at 968.

Individually Initiated Prayer by a Student Speaker

49. It is often the case that one or more students from the Senior Class are selected to speak at graduation, such as the Senior Class President, Valedictorian and Salutatorian. (While discussed in terms of a high school graduation, these same considerations would apply to a graduation or promotional ceremony from middle school.) Depending on local practice, the Senior Class may also elect one or more students to speak. Unlike the case of organizing and permitting collective prayer at graduation, school personnel may not censor a student who voluntarily chooses, on his or her own initiative, to include religious themes or references, including prayer, in a graduation address. If a student speaker elects on his own to use a portion of his allotted time delivering a prayer, or otherwise reflecting on the event of graduation from a religious perspective, it is not a

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11 See also ACLU v. Blackhorse Pike Regional Bd. of Educ., No. 93-5368 (3d Cir. June 25, 1993) (unpublished opinion); Friedmann v. Sheldon Community Sch. Dist., No. 93-4052 (N.D. Iowa May 28, 1993), reversed on standing grounds, 995 F. 2d 802 (8th Cir. 1993). The reasoning in these cases follows decisions in other analogous contexts. In Collins v. Chandler Unified Sch. Dist., 644 F. 2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981), the Ninth Circuit Court of Appeals held that student-initiated and led prayer at school assemblies was unconstitutional; in B. v. Treen, 653F.2d 897 (5th Cir. 1981), aff'd, 455U.S. 913 (1982), the Court held that student volunteers could not lead classmates in prayer even though objecting students could be excused; and in Doe v. Duncanville Indep. Sch. Dist., 994 F. 2d 160 (5th Cir. 1993), the Court invalidated the practice of offering prayers before a high school basketball game. In Doe, the Fifth Circuit stated that Weisman "is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or-initiated religious expression or indoctrination." Id. at 165.

12 Injunctive orders bind only the litigating parties, their agents and privies. See Fed. R. Civ. P. 65(d). While other Federal judges in Virginia would undoubtedly consider Gearon before ruling in a similar case, they are free to reach a different result. The principle that a decision by one federal district judge does not bind other judges — even in the same district — is amply demonstrated by a comparison of Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970) and Crockettv. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983). Judge Dalton held in Vaughn that an objectively-taught, mandatory, religious education program in public school would be consistent with the First Amendment. Judge Kiser, in refusing to follow the opinion of Judge Dalton, found Judge Dalton's opinion unpersuasive on that point and held that such programs must be optional. Crockett, 568 F. Supp. at 1431.

13 The recent Harris case may furnish the Supreme Court an opportunity to resolve this issue. At the time of the adoption of the Guidelines, a petition for a Writ of Certiorari is pending.

14 There is case authority concluding that any governmental promotion of prayer during school-sponsored event is necessarily motivated by impermissible religious reasons. There is also authority to the contrary where the evidence is credible proving secular motives. For example, in Adler the Court was persuaded on the evidence of legitimate secular motives; namely, a desire to solemnize or set a serious tone for the ceremony and to respect the choices and freedom of speech of students.

violation of the Establishment Clause for the school to permit him to do so. Indeed, for the school to prohibit the speaker from doing so could violate his or her rights under the First Amendment.[15]

50. If the student speakers are selected by school officials (rather than by students), they should be selected on wholly secular criteria (e.g., class officers, class rank or other achievement), not based on what school officials perceive as the likelihood that the speakers chosen would (or would not) pray.

51. School officials should neither encourage nor discourage them students from including a religious reference or offering prayer. For the problems associated with school and class decisions about whether to have prayer, see previous section.

52. If a student speaker advises school officials of his or her intention to offer a prayer or include a religious reference, school officials may not prohibit the speaker from doing so; but, neither should they print in their official graduation program that a prayer or religious reference is expected or will occur.

53. School officials are probably entitled to review a student speaker's prepared remarks to insure that they are germane to the event of graduation. If no prayer or religious reference is found, the school officials should not ask the speaker to include one; if one is found, school officials should not require the speaker to excise it.

Baccalaureates

54. The United States Supreme Court has never explicitly ruled on the constitutionality of a baccalaureate, but the same constitutional considerations discussed in these Guidelines apply. At least two lower federal courts have found baccalaureate services involving minimal involvement of school officials to be constitutional.[16]

55. The public school itself may not sponsor or arrange private baccalaureates. Such religious services may always be arranged by students, parents and community groups off the school premises. If any group seeks to conduct a baccalaureate on premises and after hours, they can be granted use of school facilities on the same basis as may be afforded other student or community groups. The administration of the event must, however, be careful to avoid circumstances reasonably suggesting sponsorship by the public schools.

56. In order to accommodate students who may be interested in hearing about a baccalaureate service, the school may permit scheduling notices to be included on bulletin boards and over public address systems on the same basis as other scheduling notices; but care should be taken to make sure that there is no appearance of school sponsorship or official encouragement of participation. The use of disclaimers is recommended. Teachers and school administrators who choose to attend should not suggest or encourage their students to attend.

57. Teachers and school administrators may attend the baccalaureate in their capacity as private citizens, but should not plan, direct, control or supervise the ceremony.

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15 While these conclusions seem plainly mandated by well-established constitutional principles, at least one federal district court appears to have reached the opposite result. See Gearon, 844 F. Supp. at 1100, wherein Judge J. Bryan, banned all graduation prayers in the Loudoun County public schools. Due to financial constraints the local school board did not appeal this case. Therefore, Gearon is binding on the Loudoun County public schools.

16 Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp 704 (M.D. Ala. 1991), found constitutional a baccalaureate service in the high school auditorium which had been designated "public forum," and where there was no evidence that school authorities created appearances of school sponsorship. In Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991), a district court upheld a school's decision to lease its auditorium to a nondenominational group for a baccalaureate service. Under the Lemon test, the Court found that the open access policy furthered a secular purpose; 2) the school's disclaimers disassociated it sufficiently so as not to advance religion; and 3) administrative oversight of the event did not foster excessive entanglement with religion.

Release Time Programs

58. Release time programs that permit students to attend religious instruction off the school premises have been constitutionally upheld as accommodations of the spiritual needs of our people. Zorach v. Clauson, 343 U.S. 306, 314 (1952). (Such programs "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs.") The mere release of students during school hours to attend religious courses is not per se unconstitutional. The administration of the program must be carefully managed to avoid excessive entanglement with religion. Lanner v. Wimmer, 662 F. 2d 1349 (10th Cir. 1981) (registration and record keeping of students permissible). However, the public schools should not arrange, sponsor or pay for such programs, nor seek to influence or pressure students to participate in such programs. Moreover, in Illinois ex rel McCollum v. Board of Educ., 333U.S. 203 (1948), the Supreme Court held that it was unconstitutional for a public school to permit voluntary religious instruction on school premises during release-time periods. School authority should not supervise the off-campus religious instruction. Agents of the religious institution should not be permitted at school during school time to recruit students to participate in their religious exercises. Public school teachers should also not recruit students for the religious instruction program. In order to avoid excessive entanglement with religion, as a general rule no academic credit should be conferred for religious instruction. But see Lanner v. Wimmer, 662 F. 2d 1349 (10th Cir. 1981).

59. The logistics of a constitutional release time program require careful planning, knowledge of the case law in this area and attention to detail. School boards who wish to release students to attend off-school programs may do so but should consult with their local counsel regarding registration, class location, attendance policies and class scheduling. See, for example, Doe v. Shenandoah County Sch. Bd., 737 F. Supp. 913, 917, (W.D. Va. 1990); Smith v. Smith, 523 F. 2d 121, 122 (4th Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

Equal Access By Community Groups

60. Once the school district opens its facilities for use by students or community groups during non-school hours, the Free Speech clause of the First Amendment generally requires that the school district not discriminate based on the point of view of groups seeking equal access to those facilities. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). The denial of access to religious groups can constitute viewpoint discrimination in violation of the Free Speech clause of the First Amendment. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S.Ct. 2141, 124 L. Ed. 2d 352 (1993).

61. Use of school facilities by religious community groups after school hours should be granted on the same basis as other nonreligious community groups.[17] A group may not be denied use of meeting space solely because its speech, purpose or identity is religious.[18]

62. School districts may not charge religious groups a higher rental fee than nonreligious groups.[19] No rental fee may be charged religious groups if none is charged nonreligious groups.

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17 Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703 (4th Cir.), cert. denied, 114 S. Ct. 2166, 128 L. Ed. 2d 888 (1994). Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994) (parent-led religious group has right to meet immediately after school at junior high school when Boy Scout programs are permitted to meet); Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ. of Sch. Dist., 769 F. Supp. 1346 (W.D. Pa. 1991).

18 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993)

19 Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F. 3d 703 (4th Cir.), cert. denied, 114 S. Ct. 2166, 128 L. Ed. 2d 888 (1994).

Conclusion

63. Necessarily, all of the foregoing still requires thoughtful consideration of the pertinent circumstances. The United States Supreme Court has invariably emphasized "the importance of detailed analysis of the facts." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 226 (1948). And, while the judicial tests may vary depending upon the particular context, public school authorities should be familiar with the general concerns of the law and the dangers sought to be avoided. It is therefore important that the attached memorandum from the Office of the Attorney General be considered. It is fundamentally important that school authorities understand their constitutional duties to reasonably accommodate the religious heritage and pluralism of our people, to avoid an establishment of religion and, at the same time, not to adopt the impermissible view that any and all religious expression must be banished from the public school.

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MEMORANDUM

TO: ALL CONCERNED

FROM: THE OFFICE OF THE ATTORNEY GENERAL

DATE: January 9, 1995

RE: ***Memorandum of Legal Principles Animating Guidelines***

These Guidelines and accompanying memorandum are not intended as regulatory displacements of local discretion, but rather as guidance to school administrators, teachers, parents and students on the relevant constitutional and statutory principles and considerations.[1]

These Guidelines and accompanying memorandum also do not purport to provide definitive answers to all of the possible issues and varied fact scenarios as may exist in our public schools. Indeed, the United States Supreme Court has invariably cautioned that decisions in this area of law are keenly fact-sensitive.

Our public school officials, administrators and teachers must, however, have a working knowledge of the laws and principles. In so doing, government responsibly promotes the cherished freedoms underlying both our federal and state constitutions. And, in so doing, lawful decision-making is promoted, minimizing public school resources being diverted to litigation defense. Such contests are not simply interesting debates on principle. Violations of protected rights may result in substantial damage awards and prevailing plaintiffs are entitled, under federal law, to reimbursement of their reasonable attorneys fees. See 42 U.S.C. § 1988.

I. Controlling Constitutional and Statutory Provisions

A. United States Constitution

The First Amendment to the United States Constitution provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble ...."

The foregoing embodies fundamental restraints on the power of government. Under the 14th Amendment, these restraints apply not only to the "laws of Congress," but also to the policies, practices and decisions of state and local government, including public school officials, administrators and teachers entrusted with our public school system. Cantwell v. Connecticut, 310 U.S. 296 (1940); Engel v. Vitale, 370 U.S. 421 (1962).

B. Constitution of Virginia (1971)

The Commonwealth of Virginia, through its own constitution, also guarantees the free exercise of religion and a corresponding prohibition on state and local government from becoming entangled in religious affairs:

> **Art. I, §16. Free exercise of religion; no establishment of religion.** — That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion . . . . No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever ... nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion . . . . And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass

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1 This memorandum, which explains the salient legal principles governing religious expression in public schools, should be reviewed and considered by local school authorities and their counsel as background material integral to an informed understanding of specific applications in cases contained in the Guidelines.

> any law requiring or authorizing any religious society, or or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry[2]; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please. (Emphasis added.)

C. Federal Statutory Provisions

The United States Congress has enacted two pertinent federal statutes: the Equal Access Act and the Religious Freedom Restoration Act.

1. Equal Access Act, 20 U.S.C.S. § 4071, et seq.

The Equal Access Act basically guarantees student religious and Bible study groups equal access and opportunity to conduct meetings in the public secondary schools on the same basis as any noncurriculum-related student group.[3] The key text of the statute provides:

(a) 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 a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.
(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that —
  (1) the meeting is voluntary and student-initiated;
  (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
  (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
  (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
  (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.[4]

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2 Virginia's Constitution prohibits appropriations of public funds to religious organizations and sectarian schools. See Va. Const. art.IV, §16 and art.VIII, §10, and Almondv. Day, 197 Va. 419, 89 S. E. 2d 851 (1955); Miller v. Ayres, 213 Va. 251, 191 S. E. 2d 261 (1972); Phan v. Virginia, 806 F. 2d 516 (4th Cir. 1986).

3 Congress has not defined "noncurriculum-related" student group. The United States Supreme Court has indicated that the term encompasses student groups meeting for purposes not directly related to the official curriculum; such as political clubs, chess and stamp clubs, as opposed to a French club for example. Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990).

4 Congress has further provided in subsection (D) that:
Nothing in this title [20 USCS § 4071 et seq.] shall be construed to authorize the United States or any State or political subdivision thereof —
  (1) to influence the form or content of any prayer or other religious activity;
  (2) to require any person to participate in prayer or other religious activity;
  (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
  (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
  (5) to sanction meetings that are otherwise unlawful;
  (6) to limit the rights of groups of students which are not of a specified numerical size; or
  (7) to abridge the constitutional rights of any person . . . .

2. Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb-1.

The Religious Freedom Restoration Act ("RFRA") basically prohibits government, including the public schools, from substantially burdening religion.[5] An important exception is provided where "compelling" governmental interests are at stake and a "least restrictive" means is employed to further those ends. In more common parlance, public school authority must be prepared to show that its substantial burdens on religious liberty are justified by very important goals and that the means chosen is "least restrictive," that is, there being no less-intrusive alternative which would achieve or safeguard the governmental purposes at stake. In pertinent part, the Religious Freedom Restoration Act provides:

> (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest . . . .

42 U.S.C.S. § 2000bb-1.

D. Virginia Statutory Provisions. Virginia's General Assembly has also enacted the following:

(1) § 22.1-203. Daily observance of one minute of silence. — In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.

Where such one-minute period of silence is instituted, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

(2) § 22.1-203.1. Student-initiated prayer.—In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil not be subject to pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, consistent with constitutional principles of freedom of religion and separation of church and state, students in the public schools may voluntarily engage in student-initiated prayer.

Va. Code § 22.1-203.1 does not legislate an exception to the First Amendment of the United States Constitution. It also reminds us that the public schools must serve students of many faiths on an equal basis without pressure:

> [T]hat the freedom of each individual pupil not be subject to pressure from the Commonwealth, either to engage in, or to refrain from, religious observation on school grounds . . . .

Va. Code § 22.1-203.

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5 While any discussion of religious expression in the public schools would be incomplete without mention of this Act, it should also be noted that the Act represents an attempt by Congress to correct what it perceives as an ill-advised constitutional interpretationby the United States Supreme Court. While this act may be subject to challenge on grounds that it violates the separation of powers doctrine, no court has ruled on the issue so far.

Because of its influence in shaping values, public school authorities must be sensitive to the great variety of beliefs and non-beliefs among its pupils. Aligning the prestige, authority or resources of the public schools in support of a particular religious perspective or statement can be as polarizing and debilitating as directly interfering with religious liberty. This concern is heightened in matters of prayer. Such expressions are deeply personal and, notwithstanding the best of intentions, government may neither inhibit prayer nor sponsor prayer in the public schools. Even appearances of such sponsorship can be polarizing and confusing, and spark a constitutional challenge to perceived favoritism by public school authority. Application of the statute therefore requires basic understanding of the relevant considerations animating our First Amendment:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.

County of Allegheny v. ACLU, 492 U.S. 573, 593-594.

3. Compulsory School Attendance Statutes

State law provides for home instruction under certain conditions (§ 22.1-254.1) and further excuses children from the compulsory school attendance laws on religious grounds. School boards are expressly required to "excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Va. Code § 22.1-257(A)(2). A bona fide religious training or belief however "does not include essentially political, sociological, or philosophical views or merely a personal moral code." See § 22.1-257(D) and Johnson v. Prince William County Sch. Bd., 241 Va. 383, 404 S. E. 2d 209 (1991) (upholding school board determination that objections to compulsory attendance were essentially philosophical and not religious).

II. The Conceptual Framework In The Law

The foregoing guarantees and restrictions require government, including public school officials, administrators and teachers, to steer a "neutral course" in matters of religion. Zorach v. Clauson, 343 U.S. 306 (1952). This generally means that the public schools may not use their personnel, influence or resources to advance or inhibit religion. Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

It is also important to keep in mind that the Constitution also forbids the public school from discriminating among religions, as well as promoting religion generally.[6] Everson v. Board of Educ., 330 U.S.1 (1947) and Board of Education v. Grumet, __U.S.__, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994).

The required "neutrality" can be particularly daunting in the context of the public schools where freedom of speech is so fundamental, and where our religious pluralism is so substantial. While application of law can sometimes be unpredictable, good decisions can be made with common sense, a basic understanding of the legal principles, and overarching sensitivity to the principle that our schools are public, serving children of all faiths.

A. Constitutionally Protected Religious Expression

Public school authority is not required to banish all religious expression from our public schools. "The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion." Crockett v. Sorenforson, 568 F. Supp. 1422, 1425 (W.D. Va. 1983). Indeed, in some instances, the constitutional freedoms of speech and religion require governmental respect for, and accomdation of, religious expression in the public schools.

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6 Although not directly addressed by any case decision, it would also appear to be unconstitutional for a school to promote atheism or agnosticism.

Students, as well as school employees, do not forfeit their constitutional rights at the "school house gate." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). Religious expression by individuals is not second class speech, or a step-sister to secular speech. "[R]eligious worship and discussion ... are forms of speech and association protected by the First Amendment." Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263, 269 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Niemotkov. Maryland, 340 U.S. 268 (1951) (invalidating permit requirements for religious speech in a public place); Saia v. New York, 334 U.S. 558 (1948) (invalidating an ordinance prohibiting the use of amplifying devices to broadcast religious messages).

The following scenarios generally illustrate protected religious expression in the public schools:

1. students discussing religion or reading religious literature during lunch or other free time[7];
2. students who meet at school before or after class on their own to pray among themselves and without disruption to others or school operations.
3. students expressing their religious viewpoints in assigned work — such as in poems, class compositions, music and drawings — which are germane to the assigned project;
4. students expressing their viewpoints, religious or otherwise, on their person or dress without disruption or in violation of any uniformly applied dress code;

Expression which is disruptive or which materially interferes with the rights of others, or which is lewd or obscene, may be prohibited and fairly disciplined. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

School authority may also impose reasonable content-neutral "time, place and manner" rules which further their legitimate educational interests; for example, regulating student clubs' access to meeting rooms solely on a "first come-first served" basis or designating rooms or locations without regard to the content or views of the student groups. In such instances, the speaker's religious views or ideas (content) are not considered and school personnel are not motivated by hostility to the religious viewpoint. The decision or action is prompted instead by independent and legitimate secular reasons such as maintaining needed discipline or responsible management of facilities.

School personnel have broader authority to regulate expressive activity in class time or during other instructional periods. This reasonableness standard, while deferential to the work of the public schools, does not provide license to be arbitrary. Its meaning is illustrated in the following decision of the United States Supreme Court.

In Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), the Court examined the authority of the public schools over "school-sponsored" student speech; that is, speech which is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." Id. at 271. The Court upheld the right of public school authority to ensure that their instructional programs, which have not been opened up generally as a public forum for unrestricted communication, are reasonably restricted to their educational purposes:

> [W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 273.[8]

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7 Generally, also, the freedoms of expression and religion also protect teachers who privately discuss religious matters among themselves in their free time without disruption. While there is no absolute litmus test, public school teachers must be mindful that they are authority figures and agents of government. In such capacity, teachers may not use the machinery of the state to indoctrinate religion in a "captive audience." When acting for or on behalf of the public schools, teaching personnel are subject to the same principles of "neutrality" governing the governmental agency.

8 Hazelwood specifically concerned the right of school authorities to control the content of a high school newspaper produced as part of the journalism curriculum. The student newspaper in this case did not operate autonomously. Students received grades and academic credit and their articles were customarily reviewed by school administrators as part of the curriculum. The Court upheld censorship of student editorials discussing student pregnancies and referencing sexual activity considered inappropriate for younger students. The Court determined that the school principal's concern for student privacy and suitability of material was reasonable given the circumstances.

Hazelwood thus recognizes that public educators are entitled:

> [T]o assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play dissociate itself not only from speech that would substantially interfere with [its] work ... or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices....

Id. at 271-272 (citations and internal quotes omitted).

Hazelwood however should not be read as authority to impose viewpoint censorship. While administrators and teachers may discipline and grade appropriately student expression or conduct which does not conform to their academic requirements, students should not be penalized solely because their religious viewpoints appear in their work if their work otherwise conforms to the assignment.

These freedoms of individual speech and religious expression are important concerns of the law. Circumstances may exist where such expression must be accommodated because no important governmental interests are at stake. Where such interests are at stake, such as to preserve order and discipline, school authority may take reasonable and appropriate action.

B. Establishment Of Religion: "Real Threat Or Mere Shadow"

Public school personnel must have a basic understanding of the constitutional prohibition against their establishing religion in the public schools — not only because it is a most cherished restraint, but also to avoid suppressing protected speech in mistaken fear of endorsing religion. Public school authority must have "the ability and willingness to distinguish between real threat and mere shadow." Abingdon Sch. Dist. v. Schempp, 83 S. Ct. 1560, 1616 (1963).

In Lamb's Chapel v. Center Moriches Union Free Sch. Dist., __U.S.__, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993), for example, the United States Supreme Court found that a public school had violated the freedom of speech and religion in selectively excluding a community religious group from equal access to school facilities after hours. Public school fears about endorsing religion were simply not justified. A uniformly applied "equal access" policy after hours, the Court reasoned, did not realistically suggest school imprimatur of the viewpoint of any organization. And, the benefits to religion in allowing equal access to meeting space, without any special privileges, were incidental.

The Establishment Clause, like the Free Exercise Clause, has as its central purpose the protection of religious liberty and individual conscience. The United States Supreme Court has stated that the Establishment Clause accomplishes this purpose by erecting a mandatory "`wall of separation between Church and State.'" Everson v. Board of Educ., 330 U.S.1, 15-16 (1947). While the metaphor of a wall has become commonly used, it can be deceiving. The wall is not so high or so "wooden" as to absolutely proscribe any governmental action which indirectly or incidentally benefits religion.

The United States Supreme Court has realistically acknowledged that "`total separation is not possible in an absolute sense'. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility to any." Lynch v. Donnelly, 465 U.S. 668, 672-673 (1984).

Fortunately or unfortunately, there are no "bright lines" for determining whether governmental action has crossed the line and established religion. The United States Supreme Court itself has remarked that the Establishment Clause erects a "`blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" 465 U.S. at 679. While not confining itself to any particular test, the Court has however traditionally applied a three-part test (also known as the "Lemon test") in searching for impermissible

establishment.[9] In brief, the "Lemon test" requires that governmental action:

- be animated by a secular purpose(s) or motive(s);
- have a primary effect which neither advances nor inhibits religion; and
- does not foster excessive entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

In other words, government decisions motivated by purely religious goals will ordinarily be invalidated. And, even when governmental action is animated by secular interests, it will nonetheless fail if its primary effect advances or inhibits religion or infuses government excessively in religious affairs. The United States Supreme Court, for example, has invalidated statutes authorizing voluntary student Bible readings at the opening of each school day over the intercom system or directly in class by a classroom teacher. The primary effect of such practice impermissibly advanced religion in the public schools. The Court found it immaterial that dissenting students could leave or that religious readings responded to the needs of the majority. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause.").[10]

The Court has likewise invalidated a state law providing for a "moment of silence" where the evidence established no purpose other than to introduce voluntary prayer into the public schools. Wallace v. Jaffree, 472 U.S. 38, 53 (1985). And, in Stone 1v. Graham, 449 U.S. 39, 41 (1980), the Court invalidated the government posting of the Ten Commandments in the public schools where there was no showing that the posting was genuinely part of any secular instructional program or other non-religious purpose:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.

Stone, 449 U.S. at 42.

The requisite "neutrality" in matters of religion does not mean that the Bible or other religious material can not be studied for its artistic and literary worth, for example, when objectively presented as part of a secular program. The Court has recognized that public education may not be complete without a study of our religious heritage or balanced comparison of religions. School Dist. v. Schempp, 374 U.S. 203 (1963). In such circumstances, the governmental motive or design is not the advancement of religion, the primary effect is to

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9 Unless and until overruled, the "Lemon test" provides the required conceptual framework. The "Lemon test" has received substantial criticism from several quarters, including justices on the Court favoring a more predictable, less result-oriented test. Justice Antonin Scalia has described this traditional test in picturesque terms:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys ....

Writing for the majority, Justice White responded:

> While we are somewhat diverted by Justice Scalia's evening at the cinema, ... we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., __U.S.__, 113 S. Ct. 2141, 2148 n.7 and 2149, 124 L. Ed. 2d 352, 363 n.7 and 365 (1993).

10 A federal district court in Virginia enjoined the teaching of optional Bible classes "as a religious exercise" in the Bristol City public schools. It was immaterial that the program was optional and that students received no grade or academic credit. Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983). Manifestly, the giving of credits for religious instruction would be constitutionally suspect.

further secular educational goals, and a balanced academic study of religion ordinarily does not entangle government in religious affairs.

The Court has also found no genuine establishment concerns in providing community religious groups "equal access" to meeting rooms after hours. Lamb's Chapel, __U.S.__, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). And, in Lynch v. Donnelly, 465 U.S. 668 (1984), the Court found no establishment with a city's display of a creche in a downtown park. While a creche has manifest religious significance, the Court found that the display was designed to, and had the primary effect of, recognizing a holiday with deeply rooted secular and religious origins. In contrast, and illustrating how the facts and specific context may control the outcome, the Court invalidated a creche display in County of Allegheny v. ACLU, 492 U.S. 573 (1989). Despite the secular motives of government, the particular setting of a creche dominating a grand staircase in a county courthouse had the unavoidable and primary effect of advancing religion. The Court noted its fundamental question in each case whether:

> "[T]he challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S. at 597.

Judicial concern for the appearances of governmentally established religion have been particularly acute in the public school context. The population served not only contains a "captive audience" by reason of state law, but a population susceptible to misapprehension in an environment geared to shaping values.

See, for example, School Dist. v. Ball, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.")

Similarly, in Lee v. Weisman, __U.S.__, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), the Court invalidated pervasive governmental participation in graduation prayer. The Court also communicated concern for coercive pressure brought to bear on those students who do not, for religious reasons or philosophical reasons, wish to participate but must attend to obtain the benefits of their graduation exercise.

While Lee has produced substantial debate as to its meaning in other fact situations, Lee signals the risk of courts' finding government participation in prayer at school sponsored events. This risk is pronounced when, as a result of governmental action, school benefits and privileges are conditioned on actual or symbolic participation by objecting students in religious exercise. In such circumstances, the purported "voluntary" character of the activity is disingenuous:

> The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored belief. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.

Weisman, 112 S. Ct. at 2665, 120 L. Ed. 2d at 493.

In some cases, as with an "equal access" to meeting rooms policy, the circumstances may however suggest to the reasonable student that the public schools have not sought to sponsor religion:

> [T]here is a crucial difference between government speech [or action] endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Mergens, 496 U.S. at 250.

Because of the variety of factual contests and the many court decisions which appear to be unpredictably fact-intensive, a common sense sensitivity to the proper role of a publicly supported school operation, with great potential for influence and shaping values, should always be a foundational guidepost. School leadership, responsibly sensitive to the religions pluralism in the public schools, is critical to providing a learning environment equal to all and hostile to none:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

School Dist. v. Schempp, 374 U.S. 203, 308 (1963) (requoted in Lee, 112 S. Ct. at 2661, 120 L. Ed. 2d at 488).

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