Religion in Schools: The Pendulum Swings Toward Free Exercise

By Donna Weldon, Esq., Chief Counsel, PAESSP, and Ann McGee Carbon, Esq.

In high school civics you were probably taught the dynamic tension between the two religion clauses in the First Amendment of the U.S. Constitution. The Free Exercise Clause was intended to protect the individual's freedom to believe or not believe in whatever religion or nonreligion he chose. The Establishment Clause ("EC") was to protect religion from government interference by prohibiting any laws benefiting religion. The idea was to create a wall of separation between church and state. With the conservative shift in the U.S. Supreme Court, there are cracks occurring in the wall. The balance is being struck in favor of Free Exercise; the pendulum is swinging to allow accommodation of religion under circumstances that used to qualify as prohibited Establishment. What this means for districts and principals is the need to develop an awareness of this shift.

Q: When is prayer prohibited?

Recitation of prayer, even if it is nondenominational, at the beginning of the school day over the public address system is unconstitutional. Engel v. Vitale, 370 U.S. 421 (1962). All school-sponsored prayer and religious exercises, including reading passages from the Bible, are unconstitutional. It is irrelevant that students may be excused upon request. School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

Q: Does the same rule apply to football games?

Yes. Whether allowing prayer at a school function violates the EC depends on (1) the extent of the school's control over the event and (2) the student's coerced participation in the event. ACLU v Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3rd Cir. 1996).

The U.S. Supreme Court decided that student-led, student-initiated invocations prior to football games were a violation of the EC. Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).[1] The Court reasoned that the delivery on school property, at a school-sponsored event, over the school public address system, by a speaker elected by the student body, under the supervision of school officials, and under a policy that encourages public prayer is not private speech. The pregame ceremony, unlike a limited public forum, was not open to use by the general student body. The degree of school involvement made it clear that the pregame prayers bear the imprint of the state.

The Court focused on the EC prohibition against government coercing anyone to support or participate in religion. The district's decision to hold a student election to determine whether a prayer would be given and who would be the spokesperson was a choice attributable to the State. The election did nothing to protect the rights of students who held minority religious views but rather placed them at the mercy of the majority. The Court reasoned that the election encouraged the divisiveness and conflict along religious lines that the EC was intended to eliminate.

The Court also rejected the district's argument that attendance at an extracurricular event, unlike a graduation ceremony, is voluntary. The Court reasoned that for some students attendance is required (cheerleaders, band members, team members) and for others attendance is part of a complete educational experience. The majority opinion says, "To assert that high school students do

not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is high school football is 'formalistic in the extreme'." Santa Fe, 530 U.S. at 311.

***Q:** Is prayer permitted as part of the graduation ceremony?*

First, the United States Supreme Court struck down a school district policy permitting clergy to deliver a nonsectarian prayer at a middle school commencement. Lee v. Weisman, 505 U.S. 577 (1992). [2] The Court held that the prayer violated the EC even though offered by nonschool personnel, teachers were not present as role models, and parents were present to protect their children. The content of the prayer was to follow guidelines provided by the school officials to assure that it was nonsectarian. Because the principal determined whether the prayer should be given, chose the clergy member, and required that the prayer be nonsectarian, the principal in effect controlled the prayer. The Court focused on the element of coercion to attend the ceremony and the captive audience as part of its rationale. Students were placed in the position of hearing the prayer in exchange for participating in this capstone of their public school experience.

In a variation of Weisman, the Third Circuit was asked to rule on whether students could vote on the practice of including a school prayer at commencement. Black Horse Pike, supra. That court found a violation of the EC where the policy permitted each graduating class to vote whether to include prayer, a moment of silence or nothing at all in the graduation ceremony. Even though students would have control over the choice of prayer, the school remained in control of the graduation ceremony. School officials "decide the sequence of events and the order of speakers on the program, and ceremonies are typically held on school property at no cost to students." The court reasoned that although students were not required to attend graduation, there would be peer pressure to attend as well as to be present for "one of the most important events of their lives." 84 F.3d at 1480. In addition, the court expressed concern that a student attending the graduation who objected to the prayer would feel pressured to conform by standing with the rest of the graduates. Thus, the District was exerting coercive pressure upon students to participate in school-sponsored prayer. Foreshadowing the Supreme Court in Santa Fe, the Third Circuit concluded that a student vote for prayer imposed the will of the majority on the minority.

***Q:** May the district opt for a moment of silence or quiet reflection instead of prayer?*

It depends on the district's motivation for the practice. If the sole reason for the moment of silence is determined by the court to be secular, that is, to encourage or promote prayer in the school, then there is a violation of EC. The U.S. Supreme Court struck down an Alabama statute authorizing a moment of silence at the beginning of each school day because it lacked a secular purpose. Wallace v. Jaffree, 472 U.S. 38 (1985). [3] The Alabama statute had been amended to add prayer to a statute that already permitted meditation. The history of the legislation and the testimony of the prime sponsor and Governor supported the factual finding that the purpose was to return prayer as part of daily classroom activity.

In a case relying on Wallace, the Third Circuit struck down a New Jersey statute that authorized a brief period of silent prayer or meditation. May v. Cooperman, 780 F.2d 240 (3d Cir. 1985). The court stated the question as follows: "May the state, acting through the legislature or through a school board or through an individual teacher, take action in the school setting, that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray?" May, 780 F.2d at 252. This question, the court concluded, was not answered by Wallace. Because the trial court had determined that the New Jersey statute lacked any secular purpose, the Third Circuit found the New Jersey statute flunked the first prong of the Lemon test that requires a secular legislative purpose. [4]

With the current ascendancy of the concepts of accommodation and neutrality in the U.S. Supreme Court, federal circuit courts

have been more willing to find a secular purpose and to look at coercion differently. The most recent example is Brown v. Gilmore, 2001 W.L. 829888 (4th Cir. Va.) which was decided on July 24, 2001. The Virginia statute required local school boards to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to meditate, pray, or engage in any other silent activity. [5] The secular purposes that were part of the legislative history included "maintaining good order and discipline, creating student focus on the activities at hand and assisting the teachers in beginning the day with a period of calm which would lead to better discipline in the classroom." Id at *2.

In line with the new perspective, this court reasoned that to the extent that the statute permits nonreligious meditation, it clearly has a nonreligious purpose. The court went on to opine that "the accommodation of religion is itself a secular purpose in that it foster the liberties secured by the Constitution." The Fourth Circuit cited the state superintendent's testimony that the moment of silence is "a good classroom management tool" because it "works as a good transition, enabling students to pause, settle down, compose themselves and focus on the day ahead" making for "a better school day." The court cited U.S. Supreme court precedents, including Wallace, for the principle that under the Lemon test the purpose need not be exclusively secular.

According to the court, the second two prongs of the Lemon test were easily passed. The statute's facial neutrality between religious and nonreligious modes of introspection and other silent activity neither advances nor hinders religion. The only limitation in the statute, noted by the court, is that the students must conduct themselves in a manner that preserves silence and does not interfere with other students' silent activity. The only coercion the court saw was to maintain silence. The third Lemon prong, which prohibits entanglement, the court determined to be satisfied because the teacher simply informs the students of their options during the enforced minute of silence. The court concluded that informing students that one of their options is prayer is a negligible involvement with religion.

In summary, the court said that, "Establishing a short period of mandatory silence does not *ipso facto* amount to the establishment of anything but silence." The court continued, "Neither the teacher nor any student will know how any other student uses the time because it is, fortunately, inherent in the human constitution that what transpires in the mind cannot be known by others." The court reaffirmed that it was untroubled by the use in the statute of the word "prayer" as an option because to require a ban on the use of religious terms would manifest a hostility to religion barred by the Constitution.

Gilmore follows the trail blazed by the Eleventh Circuit Court of Appeals in Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997). The analysis of Gwinnett is similar to Gilmore. In Gwinnett, one unusual angle was that the teacher/plaintiff argued that the moment of reflection favored silent prayer and discouraged audible prayer. As a result, he argued that it inhibited the prayer of those students with religious beliefs requiring audible prayer. The Gwinnett court was not persuaded because the Georgia statute at issue did not mandate silent prayer. Gwinnett reasoned that students whose faith required audible prayer need not pray during the moment, but instead could engage in secular reflection.

Q: ***What administrative guidelines for a moment of silence were approved by the courts?***

- Ø Any board policy on the moment of silence should expressly state a clear secular purpose and that the moment shall not be conducted as a religious service or exercise.
- Ø Teachers should be directed not to coerce or tolerate coercion by some students to force others to pray.
- Ø Teachers should set forth the options (reflection on anticipated activities of the day, goals for the day), explaining that the only limitation imposed is silence.

- Ø Teachers should not suggest that students use the moment of quiet reflection for prayer.

- Ø Teachers should be directed that the time shall not be conducted as a religious service or exercise.

Q: When has the U.S. Supreme Court permitted prayer in the schools?

Recently the Supreme Court has permitted prayer by the Good News Club, a Christian evangelical group, at afterschool meetings of the club on school property. Good News Club v. Milford Central School, 121 S.Ct. 2093 (2001).[6] The case arose in the context of the Superintendent refusing to grant permission to the Club to meet under the school's facilities use policy. The board's policy made the facilities available to district residents for social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that the meetings were open to the general public. The policy prohibited use by any individual or organization for religious purposes. The Board rejected the facilities requested use "for the purpose of religious instruction and Bible study."

The school district argued that a limited public forum does not require it to allow persons to engage in every type of speech. The district may be justified in reserving its forum for certain groups or for the discussion of certain topics. It acknowledged that restrictions must not be made on the basis of viewpoint and must be reasonable in light of the purpose served by the forum.

The Court concluded that the district's actions were analogous to the unconstitutional viewpoint discrimination in Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). In Lamb's Chapel, the Court found the district to have violated the free speech clause when it excluded a church group from presenting films at the school based solely on the film's discussions of family values from a religious perspective. The majority could see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.

The district's EC defense was rejected because the meetings were held after school hours, not sponsored by the school and open to any student who obtained parental consent. Because the children cannot attend without their parents' consent, the Court felt they cannot be coerced. Neutrality was held to be respected, not offended, when the school, following neutral criteria, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. Justice Scalia, in his concurring opinion, specifically stated that proselytizing speech/evangelism is the same as the recruitment that is permitted for other community group membership. He rejected the attempt to distinguish between worship and other religious speech.

Q: What religious activities may take place at school?

The U.S. Secretary of Education under President Clinton, Richard Riley, identified the following permissible practices:

1. Students may pray individually, such as before meals or tests, or read their Bible or other scriptures.

2. Engage in nondisruptive individual or group prayer or discuss religious news in cafeterias or hallways.

3. Participate in before or after school events with religious content, such as "See You at the Flagpole," on the same terms as students may participate in other noncurricular activities.

4. Discuss with and attempt to persuade peers about religious beliefs, just as they do with regard to political topics, as long as such discussion does not harass other students.

5. Schools may teach about religion, including the Bible or other scripture, the history of religion, comparative religion, the Bible as literature, the role of religion in history, art, music.

6. Student may express their religious beliefs in school written and oral assignments and artwork.

7. Distribute religious literature to their schoolmates on the same terms as students are permitted to distribute other literature that is unrelated to school curriculum or activities.

8. Display religious messages on items of clothing, subject to the same rules as comparable messages.

9. Under the Equal Access act, conduct a meeting to include a prayer service, Bible reading, or other worship service.

Although developed by the Clinton Administration, these guidelines on religious expression in public schools remain in place under the Bush Administration. They are available at the U.S. Department of Education website at www.ed.gov/inits/religionandschools.

Q: May a teacher limit a student's ability to present religious material in class in response to the teacher's assignment?

It depends. Indeed, this question illustrates that even the courts are confused and uncertain about where to draw the line between the EC and a student's Free Exercise and Free Speech rights. In C.H. v. Oliva, 195 F.3d 167 (3d Cir. 1999), students in a first grade class were permitted to bring in their favorite story to read aloud in class. C.H.'s son, Zachary, selected the story of Jacob and Esau from his children's Bible. Because the story was taken from the Bible, Zachary's teacher would not allow him to read the story in front of his classmates and instead had him read it to her privately. A three-judge panel of the Third Circuit held that if a teacher concludes that the pedagogical detriment of allowing religious material in class outweighs the pedagogical benefit, then the teacher may exercise his/her discretion to restrict the student's presentation of the material. The case was then argued "en banc" before all the judges of the Third Circuit. These 12 judges could not decide whether the teacher's actions were a violation of the Free Exercise Clause. Because the en banc court was equally divided, court rules required that the earlier decision be affirmed. See 226 F.3d 198 (3d Cir. 2000). In June, the Supreme Court declined to hear the appeal. Accordingly, the opinion of the 3-judge panel is the only guidance on answering the question.

In its decision, the court followed the Supreme Court decision in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), which held that "educators do not offend the First Amendment by exercising ... 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 271-73 (emphasis added). The court held that expression in the classroom constitutes school-sponsored speech because it is part of a "supervised learning experience." Unlike extracurricular speech, in this setting "viewpoint neutrality is neither necessary nor appropriate, as the school is there responsible for "determin[ing] the content of the education it provides." C.H., 195 F.3d at 173 (quoting Rosenberger v. Rector, 515 U.S. 819 (1995)).

In holding that the teacher could prohibit the student from reading his Bible story in class, the Third Circuit carefully limited its ruling to the fact that a first-grade class was involved. The court deferred to the teacher's exercise of discretion about what was appropriate for her class and concluded that she could reasonably consider that there was a potential that these young students would perceive Zachary's story as a school-sponsored Bible reading. The court explained that "[w]hile older students may be able to distinguish messages a teacher specifically advocates from those she merely allows to be expressed in the classroom, most first graders cannot be counted on to make this nuanced distinction." 195 F.3d at 175. The court noted that "there are undoubtedly some contexts in which a school's foreclosure of student religious expression in a classroom will not be reasonably related to a legitimate pedagogical concern." Under the facts of this case – a captive, religiously heterogeneous first-grade class – the teacher's decision did not violate the student's First Amendment rights. Given other facts, however, the outcome may very well be different.

---

[1] The opinion in this 6-3 decision was authored by Justice Stevens. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

[2] Justice Kennedy wrote the majority opinion in this 5-4 decision. C.J. Rehnquist, Justices White, Scalia and Thomas dissented.

[3] In this 6-3 decision, Justice Stevens authored the majority opinion; Justice O'Connor concurred in the judgment only; and then-Chief Justice Burger wrote the dissent, which was joined by Justices White and Rehnquist.

[4] Under Lemon, to withstand an EC challenge, (1) a statute must have a secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. See 403 U.S. at 612-13.

[5] Compare the Pennsylvania statute found in Section 1516.1 of the School Code:

> (a) In each public school classroom, the teacher in charge may, or if so authorized or directed by the board of school directors by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled.
> (b) The silent prayer or meditation authorized by subsection (a) of this section is not intended to be, and shall not be conducted as, a religious service or exercise, but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day.

[6] The majority opinion was written by Justice Thomas, who was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Breyer and Kennedy. The Dissenters were Justices Stevens, Souter, and Ginsburg. By this point the pattern of the Justices should be clear; this majority seeks to permit the rights of the religious viewpoint to be heard.