

Sins of Omission:

The Federal Prayer Guidance and Strategies for Compliance



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Context

- Lucky Elk Grove, Calif. school district
- Complex Law
 - Establishment Clause
 - Free Exercise Clause
 - State law
- Complex politics
 - Organized, passionate constituencies
 - Political & legal advocacy organizations

Background

- Supreme Court decisions and political fallout
- Lawsuit culture

- Attempted consensus statements
- 1998 U.S. Department of Education guidelines on Religion in Schools – not legally binding

Good News and Bad News

- Congress to the Rescue!
- No Child Left Behind Act of 2001

Overview

- Statutory framework
- The challenge for schools
- Provisions of federal guidance on prayer in schools
- Legal and political issues for schools
- Options for school leaders

Statutory Framework: Mandates for Everyone!

- Local: Annual certification by every local school district to SEA
- State: Annual SEA report on local compliance
- Federal: U.S. Department of Education guidance on school prayer, every two years

Local

- As a condition of receiving NCLB funds, district must certify that no district policy prevents, or otherwise denies participation in, constitutionally protected prayer
- File annual certification with SEA:
 - Last certification was due Oct. 1

State

- State department of education must report annually to U.S. Department of Ed.:
 - Whether any district failed to certify
 - Any complaints filed against district alleging that district's policy does prevent protected prayer
 - Status of state action on complaint
- Last certification was due Nov. 1

U.S. Dep't of Education

- Must issue guidance, in consultation with U.S. Department of Justice, on "current state of the law" on constitutionally protected prayer in schools
- Important: District certification is that policies do not infringe on prayer rights "*as set forth in the guidance*"

The Challenge for Schools I

- Cannot ignore guidance!
 - NCLB contemplates complaints to SEA
 - State must report complaints and status of state actions
 - U.S. Department of Ed. also has enforcement authority, including withholding federal funds

The Challenge for Schools II

- Cannot accept guidance at face value!
- “Current state of the law”?
 - Gloss over splits among the courts
 - Sins of omission that can lead schools into legal trouble
 - Sins of omission that imply local options are more limited than Constitution requires
 - Expansive notion of “prayer”

Some provisions helpful

- Students can pray, alone or together, in non-instructional time
- Students can have religious clubs (EEA)
- Moments of silence, during which students may pray, are constitutional – important!
- District may not organize prayer at graduation or select speakers so as to favor religion
- District may not organize religious baccalaureate ceremony

Issue: Prayer at graduation

- Guidance:
 - If speaker selected by 'genuinely neutral, even-handed criteria' and 'retains primary control' over expression, no school endorsement
 - School may issue 'neutral disclaimer,' as long as it does so in a way that neither favors nor disfavors religious speech

Issue: Prayer at graduation

- Courts very divided on this issue
 - Some say school must prevent religious prayers or graduation speech
- Supreme Court let stand Ninth Circuit *Lassonde v. Pleasanton Unified Sch. Dist.*:
 - School tried disclaimer: court didn't buy it
 - Suggests school has duty to prevent prayer to captive audience

Issue: Prayer at graduation

- Even in jurisdictions where law is closer to the guidance, guidance is incomplete:
 - Eleventh Circuit: proselytizing speech is coercive and violates Establishment Clause (*Chandler*)
 - Fifth Circuit: statute allowing graduation prayer constitutional where statute required prayer to be student initiated, non-proselytizing, and nonsectarian (*Ingebretsen*)

Issue: Prayer at graduation

- Where Circuit Court has not ruled (like 4th Cir.), local courts may have:
 - Fed. dist. ct. in W.Va.: prayer at public school graduation inherently violates Est. Cl. - 2002
 - Fed. dist. ct. in Virginia: same – 1993
 - D.C. court: ballot initiative to allow prayer violated Est. Cl.

Issue: Prayer at graduation

- “Neutral even-handed criteria” not the whole story:
 - Student elections as to whether to hold invocation consistently struck down
 - Useful exercise to frame each policy considered with “anti-religious” as well as religious

Issue: School personnel

- Guidance:
 - Teachers “in official capacity” may not engage in, encourage, or discourage prayer
 - Where the “overall context makes clear” that teachers are not in “official capacity,” they may participate

Issue: School personnel

- These lines between “official” and “unofficial” capacity are not so tidy:
 - Current lawsuits around country on related issues:
 - Teacher’s desire to lead “Good News” club
 - Demands that teacher distribute religious flyers, etc. – case pending in 4th Circuit

Issue: Class assignments

- Guidance:
 - Students may submit religious expression as homework
 - Assignments should be graded according to neutral academic criteria
 - Note: “prayer”?

Issue: Class assignments

- Some court have held that schools may require students to submit non-religious assignments
- Courts generally more cautious where young, impressionable children concerned
- Courts more concerned about oral presentations
- Practical concerns for teachers

Issue: Board motives

- Supreme Court in *Santa Fe Ind. Sch. Dist. v. Doe*:

School board can still run into problem with otherwise acceptable policies if history or language of policies suggests that they are motivated by desire to promote prayer

- Courts will look past “sham” purpose

Schools in the crossfire I

- Some religious activists:
 - Celebrating guidance
 - Presenting guidance to school boards and school officials (including here in Virginia)
 - Lawyers invoking guidance in court

Schools in the crossfire II

- Americans United for Separation of Church and State
 - Dismay
 - Offering legal assistance to any district “unjustly” faced with loss of funding
- American Civil Liberties Union
 - Carson City, Nevada lawsuit over policy adopted based on guidance

Risk factors: Impressions

- Impression that nothing has changed: just like last guidelines, just paper pushing
- Impression that too much has changed: some in community may believe guidance has changed the district's constitutional obligations or trumps court holdings
- You know your community best

Risk factors: Lawsuits

- Private right of action appears unlikely
- Like *Gonzaga v. Doe* factors re. FERPA:
 - No rights creating language
 - Directs Secretary of Ed. re. funding
 - Focuses on regulated (schools), not protected (individuals)
 - Concerns institutional policies/practices
 - Provides administrative enforcement mechanism

Risk factors: Complaints

- State and federal enforcement possible – political potency
- Even frivolous complaints take up time and resources and can end up in court

Risk factors: Courts

- Judicial prerogatives in construing constitutional rights
- Judicial deference to administrative agency probably not called for

Risk factors: Timing issues

- Stagnant while law continues developing
 - *Lassonde* – Ninth Circuit ruled 12 days after guidance issued – Supreme Ct let stand
 - Guidance only updated every two years
 - What do schools do while it's outdated?
 - What does answer imply about conflicts now?
- Will guidance change with each administration?

Actions and Options: Check certification

- Certification filed with SEA?
 - Reports indicate that some districts and charter schools have not filed
- Texas potential complaint arising from U.S. Department's delay in releasing guidance

Actions and Options: School Board & Officials

- Know guidance exists & funding at stake
- Know guidance tells only part of the story
- Know guidance is not necessarily a defense against legal liability
- Know local discretion may be broader than guidance suggests
- Know to consult counsel if a request or demand is made, or complaint threatened, based on the guidance

Actions and Options: Review district policies

- Important: district certification is *negative*:
 - Policy that is general or silent does not violate the guidelines
 - Example: High school will hold graduation ceremonies “consistent with right of all students under Establishment and Free Exercise Clauses”
 - Tradeoff: less helpful to school staff

Actions and Options: New policies 1

- Adopt new policy to conform to both guidance and case law in your jurisdiction, AND state law requirements
- Example: School officials shall review and approve all speeches in advance of assemblies and graduation ceremonies.
 - Carson City, Nevada situation

Actions and Options: New policies 2

- Remember: distinguish between what is required and what is permissible under guidance and case law
- Example: If case law gives you discretion over religious expression in homework, you still could choose to adhere to guidance.
- Example: Guidance allows you to dismiss students for off-campus religious activity, but you need not grant every request despite impact on instruction

Actions and Options: Just conform to guidance?

- Possibly based on local risk calculation
- Legally risky:
 - Plaintiffs CAN sue over constitutional rights
 - Court that decides controversy may be the one whose opinion was ignored
 - Risk of loss of qualified immunity, depending on clarity of court cases vs. existence of guidance

Actions and Options: Initiate community dialogue

- You know your community best
- Option if you are anticipating community controversy
- National organizations like the Freedom Forum have done so on national level
- Other local communities have done this, with some success

Actions and Options: Initiate community dialogue

- Distraction or democracy?
 - Public confidence in public schools
- Diverse stakeholders
 - Increasing religious diversity
- Refresher in the Bill of Rights
 - Freedom Forum “First Amendment Schools”
- Teaching *about* religion
- Attention from litigious culture warriors is a compliment: If not us, who?

Additional Resources from NSBA:



- Where: www.nsba.org
 - Click on School Law link
 - Click on School Law Issues link
 - Click on Religion link
- What:
 - Text of NCLB and instructions for pulling up Section 9524
 - Link to Department of Education prayer guidance
 - List of selected court cases
 - Online resources, e.g., Freedom Forum publications

Additional Resources from NSBA:



- For National Affiliate districts: www.nsba.org/na
- NSBA’s *Legal Clips* service:
 - Free, weekly school law e-mail updates, open to all subscribers
 - Short, reader friendly summaries, links to additional information
 - Self-subscribe at NSBA’s Web site School Law page
- Or contact Tom Hutton:
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