



October 10, 2013

Re: ACLU of Tennessee's Letter Regarding Prayer at Football Games

Dear Director:

You recently received a letter from the ACLU of Tennessee warning you against the long-standing tradition at many schools of opening their football games with prayer. The ACLU's letter makes misleading, blanket statements about prayer at school and leaves you with the unmistakable impression that prayer at football games is always impermissible. But rather than tell you what you can't do, Alliance Defending Freedom is here to tell you what you can do. Courts have rejected Establishment Clause challenges related to student-initiated, student-led prayers at football games and other sporting events when they occur pursuant to a policy that allows a student chosen by a neutral selection process to give a pre-game message on a topic of his or her own choosing. Such a policy provides a school district with the proper balance between respecting the right of students to express their faith and avoiding violations of the Establishment Clause.

School officials often mistakenly believe that allowing students to engage in religious speech at school would violate the so-called "separation of church and state" – a doctrine often cited in connection with the Establishment Clause of the First Amendment. But in a case upholding the inclusion of the Ten Commandments in a display at a county courthouse, the Sixth Circuit Court of Appeals rejected this "separation," stating that "[t]he First Amendment does not demand a wall of separation between church and state." *ACLU of Kentucky v. Mercer County, Ky.*, 432 F.3d 624, 638 (6th Cir. 2005). To the contrary, when it comes to student expression, the First Amendment protects the right of students to share their faith at school. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.") And the right to engage in religious speech includes the right to pray. As the Supreme Court held in *Santa Fe Independent School District v. Doe*, the very case cited by the ACLU to support its ban on prayer at school, "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." 530 U.S. 290, 313 (2000) (emphasis added).

While it is true that school-endorsed graduation prayers have been declared unconstitutional, “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis added). Private student speech does not violate the Establishment Clause. *Id.*; see also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995). Within a neutral forum, student-initiated, student-led prayers at sporting events are private student speech.

A school’s “fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students.” *Mergens*, 496 U.S. at 251. Any possible misperceptions that the school is “endorsing religion” are cured by the school’s ability to insert disclaimers. See *Pinette*, 515 U.S. at 769 (“If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.”); *id.* at 776 (“the presence of a sign disclaiming government sponsorship or endorsement on the . . . cross, would make the State’s role clear to the community.”) (O’Connor, J., concurring); *id.* at 784 (disclaimer cures confusion over misperceptions of endorsement) (Souter, J., concurring in part and concurring in judgment). The Ninth (and other) Circuit Courts have adopted this position in the school context:

[I]t is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views. *The school’s proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it.*

Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (emphasis added) (quoting *Hedges v. Wauconda Cmty. Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) (internal quotations and brackets omitted).

In the context of school sporting events, a school policy containing the following elements should prevent any appearance of endorsement:

- (1) The school creates a time at the beginning of the sporting event for a student to speak on a matter of his or her own choosing for the purpose of celebrating the event and bringing the attendees to attention;
- (2) Neutral criteria determine which student(s) is (are) allowed to speak during this time;
- (3) There is no involvement or prior review of the speaker’s message by the school or school staff; and

- (4) Students are instructed that their speech may not materially and substantially interfere with the sporting event, or be vulgar, lewd or obscene.

This type of neutral, equal access policy has been upheld as constitutional by multiple courts because it strikes the right balance between respecting the First Amendment rights of students to express a religious viewpoint while avoiding a violation of the Establishment Clause. *See Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1082 (11th Cir. 2000); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992); *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000). Following these parameters, the Supreme Court's "objective observer" can easily conclude that a student-initiated prayer results from the *private* choice of a student – not from endorsement or coercion of the school. To insure that an objective observer is not confused, the school can announce a disclaimer prior to the pre-game message that informs the audience that views expressed by the students are not those of the school. This comports with the principle of "educat[ing] the audience rather than squelch[ing] the speaker." *Hills*, 329 F.3d at 1055

The fear associated with a lawsuit by anti-religious groups is understandable. But rather than "throwing the baby out with the bathwater" and banning all prayer at sporting events as the ACLU of Tennessee would encourage you to do, your school district can adopt a neutral policy that allows students to give a pre-game message, including one that contains a prayer if the student speakers so chooses, prior to the start of sporting events.

To assist your school district, we have attached a model policy that incorporates the elements referenced above. Alliance Defending Freedom's team of attorneys stands ready to assist your school district in implementing such a policy and defending it from legal challenges by groups like the ACLU. Please contact us at 1-800-835-5233 for more information or to obtain legal assistance for your district.

Cordially,



Jeremy D. Tedesco, Senior Legal Counsel
Matt Sharp, Legal Counsel
Rory D. Gray, Litigation Counsel