

OP. NO. 05-044

CONSTITUTION OF THE UNITED STATES: AMENDMENT I (FREEDOM OF SPEECH CLAUSE).

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS (FREEDOM OF SPEECH).

Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events as private citizens violates First Amendment rights of free speech.

The Honorable L. Scott Lingamfelter
Member, House of Delegates
July 11, 2005

Issue Presented

You ask whether it is constitutional for Fairfax County Public Schools to instruct principals and other staff members that they may attend, but not speak at baccalaureate events, regardless of whether such events are held on school property or elsewhere.

Response

It is my opinion that the Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events is constitutionally unwarranted and would be a violation of their First Amendment rights of free speech as private citizens.

Background

You enclose with your request a document from the Fairfax County Public Schools entitled "Guidance Regarding Baccalaureates in Schools"¹ ("Fairfax guidance document"), which states that "[p]rincipals and other staff members may not be speakers at a baccalaureate, regardless of whether it is held at the school or elsewhere. If principals and staff wish to attend as individuals, they may do so." A May 18, 2005 memo² from the Office of the Superintendent for the Fairfax County Public Schools ("Superintendent memo"), states, in relevant part, the rationale for the ban:

Under the Constitution of the United States, ... Fairfax County Public Schools ha[ve] an obligation to maintain separation between church and state. Because teachers and administrators are highly visible representatives of the school, their speaking at a baccalaureate service—which typically includes religious elements—can be misconstrued.

In an apparent response to concerns that a school employee speech ban at baccalaureates raises constitutional problems, the Superintendent memo continues:

The school division recognizes that, this late in the year, it is difficult for some school communities to change baccalaureate plans and is working on a case by case basis to find workable solutions that will allow teachers to speak as private citizens.

Applicable Law and Discussion

1. The United States Constitution

The First Amendment to the Constitution of the United States provides that "[c]ongress 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 First Amendment embodies fundamental restraints on the power of government. Under the Fourteenth Amendment, these restraints apply not only to the laws of Congress, but also to the policies, practices and decisions of state and local government,³ which would include public school officials, administrators and teachers entrusted with our public school system.

2. Constitution of Virginia

Article I, § 16 of the Constitution of Virginia also guarantees the free exercise of religion and a corresponding prohibition on state and local government from becoming entangled in religious affairs:

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 any law requiring or authorizing any religious society, 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; 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.

3. The State of the Law on Freedom of Religion

Generally and in the School Context in Particular

It has become mistaken for fact and as a principle of law that the United States Constitution requires the "separation of church and state." Such presumptions are incorrect. The Supreme Court of the United States has clearly stated that there is no constitutional requirement for the "separation of church and state," "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."⁴

Likewise, the popular understanding of the Religion Clause as mandating a "wall of separation" is not a correct constitutional standard. The Supreme Court has observed:

The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state[.] The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.^[5]

The Court went on to say:

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation"^[6]

The United States Constitution protects the rights of students to express their religious beliefs on school property just like any other group.⁷ Likewise, the Establishment Clause does not prohibit students from organizing a privately sponsored baccalaureate service off school grounds.⁸ The Fairfax guidance document⁹ acknowledges that such events are wholly voluntary and privately sponsored. Nevertheless, both the Fairfax guidance document and the Superintendent memo¹⁰ bar any school employee from speaking at baccalaureates for fear that any speech by such public employees may be misconstrued. The Fairfax public schools rationale for the ban is, according to the Fairfax guidance document, an attempt "to maintain separation between church and state." As previously noted, reliance on this oft-quoted phrase is not a proper understanding of the freedoms protected by the First Amendment and may lead to an infringement of the constitutional rights of students of faith.¹¹

4. Public Employment Case Law

The United States Constitution not only protects freedom of religion, but it also recognizes that religious expression is a form of free speech protected by the First Amendment. It is important that public bodies, including public schools, not deny students or teachers of their free speech rights under the guise of preventing state endorsement of religion.

The United States Supreme Court and the Fourth Circuit Court of Appeals, in a series of decisions involving the First Amendment rights of public employees, continually have cautioned that public bodies must be careful to distinguish between speech made in one's capacity as a public employee and speech made in the one's capacity as a private citizen.¹²

The Fourth Circuit has denied qualified immunity to an employer who placed conditions on a police officer's return to work that barred the employee from engaging in criticism of the department.¹³ The Court held that the conditions were an overly broad prior restraint that infringed on the employee's right to freely

speaking in his ordinary citizen capacity and that the right to do so was clear and well established in law.¹⁴

In light of this case law, it is my opinion that the school's blanket prohibition on any speech by school employees at a privately sponsored, voluntarily attended baccalaureate constitutes an overly broad prior restraint on private citizen speech that has yet to occur. Therefore, such prohibition infringes on the liberty of school employees to freely express their sentiments in their capacity as citizens.¹⁵

In addition, the Virginia State Board of Education has issued *Guidelines Concerning Religious Activity in the Public Schools*¹⁶ ("VSOE Guidelines") that directly address the subject of baccalaureates. As the *VSOE Guidelines* point out, no court has ever held that baccalaureates involving minimal involvement of school officials violate the Establishment Clause.¹⁷ The *VSOE Guidelines* state that "[t]eachers and school administrators may attend the baccalaureate in their capacity as private citizens, but should not plan, direct, control or supervise the ceremony."¹⁸ While the *VSOE Guidelines* urge schools and school officials to avoid any administrative oversight of such events, nothing in the guidelines or applicable case law warrants a blanket prohibition on any and all school employee speech while attending such events. Just as the *VSOE Guidelines* recognize that school officials may attend baccalaureates in their private citizen capacities, so too it is incumbent upon schools to recognize that school employees may also speak at baccalaureates in their private citizen capacities. In such cases, the state has no legitimate interest in repressing the speech of private individuals, even if their speech touches upon religious themes.¹⁹

Fairfax Schools' blanket gag rule on school employee speech at voluntary, privately sponsored baccalaureate events is likely to be held unconstitutional by a court.

Conclusion

Accordingly, it is my opinion that the Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events is constitutionally unwarranted and would be a violation of their First Amendment rights of free speech as private citizens.

¹A copy of the Fairfax guidance document is on file with this Office.

²A copy of the Superintendent memo is on file with this Office.

³See *Engel v. Vitale*, 370 U.S. 421 (1962); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁴*Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

⁵*Id.* (citations omitted).

⁶*Id.* (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973)). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (quoting *Zorach v.*

Clauson, 343 U.S. 306, 314 (1952)). "Indeed, we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (quoting *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948)).

⁷See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (upholding constitutionality of federal Equal Access Act, allowing use of school by student religious group, and suggesting that school system has burden of correcting any misperceptions of endorsement of religion by school); see also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (excluding evangelical group from access to public school property after hours because school's fear of endorsing religion not justified).

⁸*Lee v. Weisman*, 505 U.S. 577, 629 (1992) (Souter, J., concurring). The United States Supreme Court has prohibited school-sponsored prayer. See *id.* at 586-88 (striking down school-sponsored prayer at high school graduation ceremony).

⁹See *supra* note 1.

¹⁰See *supra* note 2.

¹¹See *supra* notes 5 and 6 and accompanying text.

¹²*Mergens*, 496 U.S. at 250 (noting that "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") (emphasis in original); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that schools' termination of public school teacher for writing to newspaper criticizing school board expenditures violates teacher's right to speak as citizen on topic of public concern); see also *United States v. Nat'l Treasury Employees' Union*, 513 U.S. 454 (1995) (holding that federal ethics rule barring certain employees from receiving honoraria unduly infringes upon public employees' First Amendment rights to express themselves as private citizens); *Connick v. Myers*, 461 U.S. 138 (1983) (upholding termination of district attorney for distributing survey to coworkers because attorney's speech was made in official, not citizen capacity, and concerned job dissatisfaction not matters of public concern); *Urofsky v. Gilmore*, 216 F.3d 401, 416 (4th Cir. 2000) (holding that Virginia statute prohibiting state employees from using state-owned computers to access sexually explicit material does not infringe on First Amendment rights of state employees); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999) (holding that police officer who offers handgun safety courses in spare time could not be punished for that private activity); *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985) (holding that police officer who performs Al Jolson tunes in black face could not be punished for his spare time avocation despite community offense).

¹³*Mansoor v. Trank*, 319 F.3d 133 (4th Cir. 2003).

¹⁴*Id.* at 137 n.3.

¹⁵See *Henrico Prof'l Firefighters Ass'n v. Bd. of Supvrs*, 649 F.2d 237, 241 n.5 (1981) (quoting *City of Madison v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 177 (1976)) ("We note that the Board's practice governs 'speech and conduct in the future ... and as such it is the essence of a prior restraint.'") Any

policy of prior restraint bears a heavy burden against its constitutional validity. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). The statement in the Superintendent memo that Fairfax is working on ways to ensure that teachers may speak in their citizen capacity does not suffice to save an otherwise impermissible prior restraint. See *Mansoor*, 319 F.3d at 138 (holding that oral statements by employer that police officer would retain right to speak as citizen did not overcome unambiguous written plan conditions stating that officer was to refrain from criticizing department).

¹⁶Va. State Bd. of Educ., Guidelines Concerning Religious Activity in the Public Schools (June 22, 1995) [hereinafter VSOE Guidelines], available at <http://www.pen.k12.va.us/VDOE/PC/religion.pdf>.

¹⁷Three federal district courts that have opined on the constitutionality of baccalaureate services have found that such events, if sponsored by private parties, do not run afoul of the establishment clause. See *Shumway v. Albany County Sch. Dist.*, 826 F. Supp 1320 (D. Wyo. 1993); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala 1991).

¹⁸VSOE Guidelines, *supra* note 16, at para. 57.

¹⁹See *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 815 (8th Cir. 2004) (holding that school has no valid establishment clause interest to justify restricting teacher's attendance at after school student bible study), *reh'g denied* 2004 U.S. App. LEXIS 20976 (8th Cir. Oct. 7, 2004); *Doe v. Sch. Dist.*, 340 F.3d 605 (8th Cir. 2003) (holding that school board member who is also parent, and who recites Lord's Prayer at son's high school graduation, is engaged in private citizen speech, not state action implicating establishment clause), *reh'g denied* 2003 U.S. App. LEXIS 17038 (8th Cir. Oct. 16, 2003).

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