



# First Amendment Challenge to the Practice of Providing an Invocation at Graduation

Dr. Steven Holen

Superintendent of Schools

McKenzie County Public School District #1

Mr. Wyatt Voll

School District Attorney

# First Amendment Challenge – Freedom From Religion Foundation

Letter received dated June 27<sup>th</sup>, 2016 from the Freedom From Religion Foundation and staff attorney, Patrick Elliott, with the regards listed as “Unconstitutional Prayer at Watford City High School Graduation”

Freedom From Religion Foundation (FFRF) is a national nonprofit organization with more than 29,500 members nationwide that includes members in North Dakota.

The mission of the FFRF is to protect the constitutional principle of separation between church and state; the website includes an online component to report a state/church violation to the FFRF.

The FFRF website promotes the foundation as the “largest freethought association in North America”.

# First Amendment Challenges – Freedom From Religion foundation

The closest chapter of the foundation is located in Minnesota and known as the Lake Superior Freethinkers.

The website states Foundation complaints have:

- Halted prayer at public schools, institutions, and public financing of nativity pageants and Easter services.

- Stopped direct subsidy to religious schools.

- Stopped Job Corps trainees from being assigned to work on a Catholic shrine.

- Ended a 122-year abuse of commencement prayers at a Top Ten University.

- Declared unconstitutional the creation of a state post to “assist clergy”

The website promotes FFRF as it wins its “4<sup>th</sup> federal lawsuit in 20 days” (10/19/2017)

A “concerned citizen” contacted the foundation regarding the graduation ceremony of Watford City High School and a violation of the first amendment.

# First Amendment Challenges – Freedom From Religion foundation

The letter outlines the complainant submitted a statement to FFRF that the WCHS graduation ceremony included multiple prayers given by students. The ceremony opened and closed with prayers, both of which invoked the name of Jesus Christ and were scheduled as part of the ceremony.

The letter cited *Lee v. Weisman*, 505 U.S. 577 (1992) which declared unconstitutional prayers at a public school ceremony – school officials may not invite a student, teacher, faculty member, or clergy to give any type of prayer, invocation, or benediction at a public high school graduation.

*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) – school’s policy allowing student-delivered prayers at high school football games violates the Establishment Clause. The letter stated Supreme Court rulings have settled the matter in which high school graduations must be secular to protect the freedom of conscience of all students.

The letter also cited a prayer taking place at a “regularly scheduled school-sponsored function” would lead an objective observer to perceive it as state endorsement of religion. The Court has stated in this context, “Regardless of the listener’s support for, or objection to, the message, an objective student will unquestionably perceive the inevitable ... prayer as stamped with her school’s seal of approval” *Id.* at 308. The scheduling of the invocation and benediction as part of the WCHS graduation ceremony served to promote religion as part of a public school district event.

# First Amendment Challenges – Freedom From Religion foundation

Letter continues: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principals to be applied by the courts” *Barnette*, 319 U.S. at 638.

“McKenzie County School District #1 has a duty to remain neutral toward religion. By scheduling prayers at graduation, the District abridges that duty and alienates the 35% of young Americans who are not religious” – citation from *America’s Changing Religious Landscape* (May 12, 2015)

“Please inform us in writing the steps McKenzie County School District #1 is taking to ensure that religious rituals are not part of graduation ceremonies or any other school-sponsored events. We would like assurances that similar prayers will not be part of future graduation ceremonies”.

School district responded in writing, dated August 2<sup>nd</sup>, 2016 to acknowledge the practice of student led invocation and benediction as part of the graduation ceremony and upon consultation with our school district attorney will eliminate the practice from future graduation ceremonies. The school district is not responsible for student speeches and presentations as part of the ceremony making reference to religion or prayer, but will not include the student led invocation and benediction as formal components of the ceremony starting with the 2017 graduation ceremony.

## Other church/state situations reviewed for compliance consideration - Baccalaureate

The student led invocation and benediction was a graduation tradition at WCHS for decades. The letter resulted in review of other school district practices that reflected mentalities found in a small western ND community that had, however, undergone a dramatic change in its population demographic and new levels of diversity that challenged previous practices and traditions.

The school district revised its approach to the baccalaureate ceremony that historically involved coordination by the senior class advisor. The school district moved all coordination and communications regarding the baccalaureate to the local ministerial association. The voluntary nature of the baccalaureate was reinforced and all school district personnel were removed from ceremony planning starting with the 2017 graduating class. Change in mindset to provide support for the ceremony without any implications of promoting the religious ceremony on behalf of the school district and its administration. Parents of senior students required to become more involved with the process and communications.

## Other church/state situations reviewed for compliance consideration – facility rental/utilization

Facility utilization and rental agreement – the school district reviewed and revised its facility utilization agreement to ensure consistency with responses and general use of school facilities. The use of facilities by other groups (i.e. park board and churches) was previously informal in nature and revised to ensure consistency and avoid favoritism of specific groups. This included the use of school facilities for funerals and general community events or fundraisers.

Request to use the high school gym for Easter Sunday service brought the issue to the forefront for the school board to determine if the request was appropriate and how to regulate future requests from multiple denominations looking to use the school building for church services or special events. The school district established a framework for receiving requests and time restrictions on which the school facilities could be utilized during the week. Non-secular based requests for school facility utilization treated in the same manner as other requests; long term rental situations were not allowed to provide other organizations opportunity to use the facilities. School district provided ongoing rental agreements to two church organizations at a time when church space was an issue for religious organization in our growing community; the policy helped to ensure the process was handled without prejudice.

## Other church/state situations reviewed for compliance consideration – student performances

Music selection for student performances was discussed and reviewed for any compliance issues. Our winter school performances frequently included selections of a religious nature (Mary Did You Know, for example) and some caution with administrators if this would also raise concern with patrons who viewed the graduation prayer as a first amendment issue.

The music selections were deemed in compliance with the first amendment if they include an educational component. Our practice was also revised to include an opt-out form for students/families who choose not to perform certain selections based on the religious nature of the song. Teachers were instructed to not penalize any students in using the opt-out process through participation points or grades. The general protocol of ensuring secular and non-secular music selections are maintained in a 50/50 ratio was adopted; a majority of songs used should generally be of a secular nature. Encourage teachers to perform a variety of selections representing multiple traditions and backgrounds to support educational purposes if using non-secular songs.

# Student clubs, social media, other first amendment issues

School district also reviewed the process of student club approval and meetings/communications during the school day as well as staff involvement and use of school facilities. The Random Acts of Kindness club was leading prayer sections around the flagpole which was questioned – the practice was deemed appropriate if not led by the advisor and did not create a disturbance for other students entering the school building.

The school district has a three tiered system of recognizing student clubs and the appropriate use of school personnel and facilities in club activities. Requests received for clubs to be established in coordination with local churches or other organizations and meetings to be held before or after the school day; the clubs were allowed to form and meet, however, with no school personnel involved with the club and its activities. (Tier 3) The club must have four or more students involved and consist of school district students only. Clubs must be preapproved by the school administration by October 1<sup>st</sup> of each school year.

Educational merits of the club and alignment with curriculum differentiate the levels (Level 1, 2, and 3) and the amount of the school district participation and communications during the school day varies based on the level of the student club.

## Student clubs, social media, other first amendment issues

Social media use by school district staff and first amendment rights led to pursuit of revisions to the Code of Conduct policy and Board discussion of Social Media policy to clarify the line between first amendment rights, employment by the school district and representation as a school district employee.

Violations of policy to specifically address personal photographs or videos that do not reflect positively on the school district as well as comments related to school district policy or procedure that limit the effectiveness of said policy or practice in protecting students or district protocol – both were specific issues to address with school district employees last year.

Social media use and abuse is an important issue with the current generation of employees; potentially impacting crisis plans and communications, political/social beliefs and comments, inappropriate communications with students, etc. First amendment rights continue to be a topic of discussion in which our school district will continue to address through policy or handbook implementation as needed. Social media policy is often difficult to articulate and define to ensure first amendment rights of employees are not impacted yet protect the best interests of students and the school district.

## Conclusion – future issues and concerns

School districts are often in a difficult position with balancing the rights of students and staff in terms of the first amendment and their ability to express and practice personal beliefs with protecting the educational process and the secular nature of a public school district.

Strong political and social stances by students are inevitable and addressing in an appropriate manner is important (national anthem protests, confederate flags, school newspaper, annual, and other expressions regarding social/political issues)

- Ohio State sued for refusal to let white nationalist speak – 10/22/2017.

The emotional nature of first amendment issues adds to the difficulty in addressing with policy that is consistent and comprehensive; many situations require case by case consideration and to fully understand the climate of the community.

Freedom from Religion Foundation issues may become more prevalent with a related KX News story aired on 10/22/2017.

- 22% of Americans do not recognize an established religion or consider themselves religious – the number has tripled since 1990 and the largest group is the millennial generation.

Questions?