

# An Open Mike?

## New State Law Requires Opportunities for Student Free Speech

The topic of religion in public schools received a great deal of attention during the recent Texas legislative session. Whenever that emotional topic is part of a public debate, we are likely to hear some people claim that courts have “kicked religion out of school.” In fact, the expression of religious viewpoints is still very much permitted in public schools.

### Constitutional Principles

The U.S. Constitution protects the right of individual students to express personal religious viewpoints. School districts, however, cannot endorse religious views or establish a preference for or against religion. In the words of the U.S. Supreme Court, “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.”<sup>1</sup>

Both the constitutionally protected freedom of individuals to express their own private religious views and the prohibition on government-endorsed messages for or against religion work together

to offer Americans the greatest possible religious liberty. Nowhere is that powerful balance more dynamic than in our public schools, where the interests of students, parents, religious and community leaders, and school officials intersect.

The freedom of individual students to express their own religious views in private conversations and to pray alone or in groups is well established. Questions remain, however, about students’ rights to express their individual views or pray when they are speaking publicly at school-sponsored events.

### New Texas Law

Hoping to clarify this point, the Texas Legislature passed a new law about student religious expression. House Bill 3678, also called the Religious Viewpoints Antidiscrimination Act (RVAA), addresses four general areas: freedom of religious expression, student speakers, religious expression in class assignments, and freedom of association. The RVAA takes effect with the 2007-08 school year.

**No viewpoint discrimination.** The law requires dis-



tricts to treat a student’s voluntary expression of a religious viewpoint on an otherwise permissible subject in the same manner the district treats a student’s voluntary expression of a secular or other viewpoint on the same topic.<sup>2</sup>

**Student speakers.** The law also requires districts to adopt a policy that establishes

a limited public forum for student speakers at all school events at which a student is to publicly speak. The policy must also:

- Require the district to provide the forum in a manner that does not discriminate based on religious viewpoint.
- Provide a method, based on neutral criteria, for the selection of student speakers at school events and graduation.
- Ensure that a student speaker does not engage in obscene, vulgar, offensively lewd, or indecent speech.
- State that the student’s speech does not reflect the endorsement, sponsorship, position, or expression of the district. The disclaimer must be provided at all graduation ceremonies and at any other event in which a student speaks for as long as necessary to dispel confusion over the district’s “nonsponsorship” of student speech.<sup>3</sup>

**Expression in class assignments.** The law states that students may express their beliefs about religion in

homework, artwork, and other written and oral assignments. Homework and other assignments must be judged by ordinary academic standards, and districts may not penalize or reward students based on the religious content of their work.<sup>4</sup>

#### **Freedom of association.**

The law states that students may organize prayer groups, religious clubs, “see you at the pole” gatherings, and other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups.<sup>5</sup>

#### **Required Local Policy**

The law specifically requires districts to adopt a local policy establishing a limited public forum and protecting voluntary student expression of religious viewpoints. The law includes a model policy, and a district that adopts and follows this policy is deemed to be in compliance with the RVAA.<sup>6</sup>

The model policy provides for student speakers at football games, any other athletic events designated by the district, opening announcements and greetings for the school day, and any additional events designated by the district, such as assemblies and pep rallies.

For each of these events, the district must select a student speaker from the highest two grade levels at the school who holds one of the following positions of honor: student council officers, class officers of the highest grade level of the school, captains of the football team, and other positions of honor designated by the district. Students from these groups may volunteer for selection and are then selected randomly by drawing names. Each student selected

speaks for a week or on another schedule designated by the district.

The model policy states that the subject of the student introductions must be related to the purpose of the event. Students must stay on the subject and may not engage in obscene, vulgar, offensively lewd, or indecent speech. The model policy prohibits discrimination based on a secular or religious viewpoint and provides for a disclaimer of school sponsorship of the speech. The model policy contains similar provisions for speeches by sports team captains, homecoming kings and queens, and the like, as well as provisions relating to graduation speeches.

The model policy also addresses religious expression in class assignments and formation of religious student groups, as discussed above.

#### **From the Law Books to the Campus Loudspeaker**

For many, the implementation of this new law will create more, often welcome opportunities for students to express their personal views on a variety of topics, including religion. But school officials will also face challenges in implementing this new law. During the legislative session, TASB did not oppose this bill but did express concerns about the challenges it would create in the public school environment.

What are the possible challenges?

**Discipline.** The constitutional foundation of this new state law is that students, not school districts, will decide what to say within limited public forums. Students may say whatever they wish, including expressing religious views and praying. If, however, a student speaker expresses a minority religious view-

point, that speech may provoke controversy. Moreover, students are not limited to the topic of religion; they may express their opinions on any other topic (as long as it is at least arguably related to the event at hand) without fearing disciplinary consequences. The law says the district must prohibit speech that is obscene or offensively lewd, which are concepts defined in Supreme Court cases. Short of this high standard, however, speech on any topic, no matter how offensive, must be tolerated.

**Discrimination.** In light of this open opportunity for free speech, which may include offensive speech, opponents of the new law express concern that hate speech and other discriminatory speech will now have a forum in public schools.

**Dollars.** Finally, no matter how school officials feel about the opportunities and challenges created by this new law, trustees will not be able to ignore the bottom line. Introducing controversial speech into the public school setting raises the possibility of legal challenges from all sides: minority-view families who feel student speeches are too one-sided; majority-view families offended by hearing a minority view; citizens who object to the law itself; and citizens who claim the district has not gone far enough in

implementing the law. The legal and financial risks generated in this emotional environment will naturally be of concern to all school officials as they seek to fulfill their fiduciary responsibility to their school districts.

#### **Resources from TASB**

TASB is already looking for ways to help your district understand these new requirements, implement them on your campuses, and avoid legal risks in the process. TASB Policy Service will issue policies conforming to the new law in Update 81. TASB Legal Services is preparing training and publications to assist school officials and ultimately school district staff in enacting policies and procedures related to student speakers. Finally, TASB Communications is thinking of ways to help you communicate with parents and the press about these new changes.

As always, if you have questions about the new legislation, you can reach TASB Legal Services at 800.580.5345.★

<sup>1</sup>*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.) (emphasis in original)).

<sup>2</sup>Tex. Educ. Code § 25.151.

<sup>3</sup>Tex. Educ. Code § 25.152.

<sup>4</sup>Tex. Educ. Code § 25.153.

<sup>5</sup>Tex. Educ. Code § 25.154.

<sup>6</sup>Tex. Educ. Code §§ 25.155, 25.156.



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