



Student Speakers at School Events

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Conflicting decisions from various federal courts have created a general sense of confusion with respect to student addresses and student-led prayer at school-sponsored events, including athletic events and graduation ceremonies. When a student takes the microphone, is the student sharing his or her personal views, or is the student speaking as a representative of the school district?

The following article is a brief overview of relevant court cases, statutes, and guidance from the U.S. Department of Education. When these sources conflict or fail to offer an answer, school officials should consult their school attorneys for advice about how to minimize the risk of legal challenge.

Government, School-Sponsored, or Private Speech?

Student speech can be characterized in one of three ways: government, school-sponsored, or private speech.

In school speech cases, there are three recognized categories of speech: government speech, private speech, and school-sponsored speech. *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636 (S.D. Tex. 2010).

Government speech is not subject to scrutiny under the Free Speech Clause. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). Instead, the government may offer its own speech, including speech expressed by individuals on behalf of the government, without implicating the Free Speech Clause. The “government speech doctrine” is justified at its core by the idea that, in order to function, the government must be able to favor certain points of view.

When a student speaks in front of an audience at a school event, it may be “difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech” *Summum*, 555 U.S.460, 470 (2009). A forum is distinguished from government speech because government speech is expression by the government, and not simply opening a forum for private expression. The fact that private parties take part in crafting and conveying a message does not necessarily mean that the message is not one being disseminated by the government. See *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

Depending on the facts and circumstances, courts sometimes view students as speaking on behalf of the school district.

In determining whether speech is conveying a government message or a private message, the key inquiry is the degree of governmental control over the message. Speech constitutes government speech when it is “effectively controlled” by the government. *Pelts & Skins, LLC v. Landreneau*, 448 F.3d 743, 743 (5th Cir. 2006) (quoting *Johanns v. Livestock Mktg., Assoc.*, 544 U.S. 550, 560-61 (2005)). The quintessential example of pure government speech in the school setting is a principal speaking at a school assembly. *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002). Depending on the circumstances, a student’s speech at a school district event may be characterized as government speech as well.

For example, relying on the factors articulated in *Sumnum* and *Walker*, a federal district court in Florida concluded that student speech over a stadium’s loudspeaker at a state-sponsored football tournament would be government speech not subject to the First Amendment’s viewpoint restrictions. The stadium loudspeaker was not a public forum because the state athletic association had not opened it to use for any purpose for the public. Consequently, allowing the loudspeaker, which otherwise was not accessible to private parties, to broadcast a prayer during a government controlled and hosted event would be perceived as state endorsement of a religious message. *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass’n, Inc.*, No. 8:16-CV-2753-T-36AAS, 2017 WL 2458314, at *8 (M.D. Fla. June 7, 2017).

Even if the message is personal to the student and not a government message, the student’s speech may take place in a context that is school-sponsored, and therefore subject to school district control.

School-sponsored speech is a category of speech devised for the distinctive context of the public school. It is neither pure government speech nor pure private speech, but rather student expression that “may fairly be characterized as part of the school curriculum,” which means that it is “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Such speech may be regulated by the school so long as “editorial control over the style and content of student speech in school-sponsored expressive activities . . . [is] reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)³. School-sponsored speech includes “school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). These speech activities are school-sponsored because they “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). One justification for giving schools this additional

authority is to ensure that “the views of the individual speaker are not erroneously attributed to the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). This is important, among other reasons, so that the school may refuse to sponsor student speech that would “impinge upon the rights of other students” or “associate the school with any position other than neutrality on matters of political controversy.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

Student speech may be considered school-sponsored under *Hazelwood* if it could reasonably be understood to bear the school’s *imprimatur*, a word meaning “sanction” or “approval.” Relevant considerations include: (1) where and when the speech occurred; (2) to whom the speech was directed and whether recipients were a captive audience; (3) whether the speech occurred during an event or activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials; and (4) whether the activities where the speech occurred were designed to impart some knowledge or skills to the students. *Morgan v. Swanson*, 659 F.3d 359, 376 (5th Cir. 2011).

Even when student speech does not occur in a traditional classroom setting, the circumstances surrounding the speech may give it the *imprimatur* of the school district. For example, the Tenth Circuit Court of Appeals determined that a valedictorian’s address was school-sponsored in light of the following factors:

- The speech occurred at an event supervised by the school's faculty that was clearly a school-sponsored event.
- The speaker qualified as a valedictorian through her grade point average. Only qualified, selected individuals could speak.
- Speakers were instructed by the principal on how to organize their speeches.
- Speakers had to submit their speeches to the administration for review for content.
- The event was “so closely connected to the school that it appeared the school was somehow sponsoring the speech.”

Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219 (10th Cir. 2009).

If the student is speaking as a school representative by providing either government speech or school-sponsored speech, the speech must not violate the Establishment Clause by endorsing, promoting, or coercing religion.

A public school may not permit school-sponsored student speech to be given over the public address system at school or school events in a manner that would violate the Establishment Clause. In *Santa Fe Independent School District v. Doe*, the U.S. Supreme Court held that a school district’s policy permitting a student volunteer to provide an invocation before games violated the Establishment Clause due to several factors. First, the invocations in Santa Fe ISD were authorized by official policy and took place on government property, at government-

sponsored events, and under the supervision of school employees. As a result, the Court refused to conclude that the pregame invocations could be considered private speech. In addition, even though attendance at football games was not mandatory, the Court felt that students should not be forced to choose between attending a game and potentially facing a personally offensive religious ritual. Finally, the Court took issue with the school district's election system for choosing a student speaker. Electing a student speaker would tend to result in the majority viewpoint being selected, to the exclusion of minority viewpoints. The Court held that the school district's policy "is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Santa Fe Indep. Sch. Dist. v. Doe ex rel. Doe*, 530 U.S. 290, 317 (2000).

Depending on the facts and circumstances, a student may be speaking to an audience as a private citizen.

When student speech is private, however, a school district may not restrict the content of the student's speech absent a compelling interest. Within a nonpublic forum, schools have a compelling interest in avoiding an establishment of religion by limiting student religious speech. In a more open forum, such as a limited public forum, at least one federal circuit court has concluded that individual rights prevail. An Alabama statute allowed nonsectarian, non-proselytizing student-initiated prayer, invocations, and benedictions during compulsory or noncompulsory school-related assemblies, sporting events, graduation ceremonies, and other school-related events. The Eleventh Circuit Court of Appeals held that genuinely student-initiated religious speech must be permitted without oversight or supervision by the school district, subject only to the same reasonable time, place, and manner restrictions applied to all other student speech. In the wake of *Santa Fe*, the U.S. Supreme Court vacated and remanded the Eleventh Circuit's decision. On remand, however, the Eleventh Circuit reinstated its original decision, finding the decisions were complementary rather than inconsistent. One decision prohibits government sponsorship of religious speech, while the other prohibits government censorship of religious speech. *Chandler v. Sielgelman*, 230 F.3d 1313 (11th Cir. 2000).

Texas state courts have relied on federal cases characterizing speech as private as opposed to government or school sponsored.

A Texas court of appeals, on remand from the Texas Supreme Court, specifically relied on the reasoning in *Chandler* when it determined that religious messages displayed on banners by cheerleaders during high school football games were private speech, not government or school sponsored speech. "In *Chandler I*, the Eleventh Circuit held that as long as prayer at a student event was "genuinely student-initiated," it was protected private speech." *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *8 (Tex. App. Sept. 28, 2017), review denied (Aug. 31, 2018). Applying the three-factor test for government speech, the Texas state court considered whether the school district, Kountze ISD, had historically used the cheerleaders' "run-through banners" during the pregame ceremony as a means to convey a message on behalf of the school district. The purpose of the run-through banners was

generally to encourage athletic excellence, good sportsmanship, and school spirit. The cheerleaders were acting as part of an extracurricular activity rather than an instructional activity, and they were not directed by staff regarding what to put on the banners, although staff did approve the messages. Under these circumstances, the court concluded the banners were not historically conveying a government message. Second, the court asked whether a reasonable observer would interpret the speech as conveying a message on the school district's behalf. The court acknowledged that because the cheerleaders were in uniform and only some individuals (like cheerleaders) had access to the field to display signs, there was some potential that a reasonable person would interpret the speech as conveying a message on the school district's behalf. The court, however, noted that the U.S. Supreme Court had specifically observed that high school students were “capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other.” Finally, the court considered whether Kountze ISD retained control and final authority over the content of the banners’ messages. While the school district showed that it exercised some editorial control over the preparation of the run-through banners, the facts failed to establish the level of control necessary to equate the cheerleaders' speech with government speech. The court also distinguished the facts of this case from the facts in the Santa Fe ISD case, where school district policy encouraged prayer. For the Kountze ISD cheerleaders, the text and content of the message, aside from the prohibition on obscene material, had always had been left up to the discretion of the cheerleaders. “When we apply the factors under Hazelwood to the facts of this case, there is no clear distinction between characterizing the expressive activity involved in this case as school-sponsored speech and pure private speech.” *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *12 (Tex. App. Sept. 28, 2017), *review denied* (Aug. 31, 2018).

In addition, a unique Texas statute, the Religious Viewpoint Anti-Discrimination Act (RVAA), characterizes public student speech as private.

In 2007, the Texas legislature passed the Religious Viewpoint Anti-Discrimination Act (RVAA), also known as the Schoolchildren’s Religious Liberties Act. The RVAA has four primary components: (1) a school district must treat a student’s voluntary expression of a religious viewpoint on an otherwise permissible topic the same way it would treat voluntary student expression of a secular viewpoint; (2) students who express religious beliefs in homework, artwork, and other written or oral assignments must be free from discrimination based on the religious content of their submissions; (3) 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 students are permitted to organize other non-curricular groups or gatherings; and (4) school districts are required 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. Tex. Educ. Code §§ 25.151-.154.

Under its student speaker policy, a school district must: not discriminate against student speakers who express religious viewpoints on otherwise permissible topics; provide neutral criteria for the selection of student speakers at school events and graduation; ensure that

student speech is not offensively lewd, obscene, vulgar, or indecent; and include a disclaimer, in writing, orally, or both, to clarify that students' speech does not reflect the endorsement, sponsorship, position, or expression by the school district. Tex. Educ. Code § 25.152.

State model policy: A unique aspect of the RVAA is that it includes a model, but not mandatory, local school district policy (state model policy). Tex. Educ. Code § 25.156. School districts may: (1) adopt the state model policy, (2) adopt a policy "substantially identical" to the state model policy, or (3) adopt a policy that differs from the model but still creates a limited public forum. Tex. Educ. Code §§ 25.152, .155-.156. School districts that adopt the state model policy or a substantially identical policy will be deemed in compliance with the RVAA. Tex. Educ. Code §§ 25.155-.156. No definition of *substantially identical* is provided.

The state model policy includes each of the four statutorily required components, plus additional details regarding limited public forums. The state model policy creates a limited public forum for student speakers at all school events at which a student is to publicly speak. The policy lists football games, opening announcements and greetings for the school day, and other events designated by the school district as events having an introductory limited public forum. Students in the highest two grade levels are eligible to speak in the limited public forum. Within that age group, the students must hold a position of honor, such as student council officers, senior class officers, football captains, and other honorary positions designated by the school district. The state model policy goes on to include numerous other detailed provisions about speaker selection and scheduling, disclaimers, and graduation ceremonies. Tex. Educ. Code § 25.156.

Alternatives to the state model policy: Due to a variety of practical and legal considerations, many school districts have worked with their school attorneys to adopt local policies that differ in some way from the state model policy. The variations are limitless, but common changes include changing the designated school events with introductory student speakers, changing the speaker selection process, and/or adding definitions into the policy in an attempt to guide uniform enforcement of the policy. Most school districts have adopted student speaker policies at TASB Policy FNA(LOCAL). Other districts have made a conscious decision not to adopt a policy in response to the RVAA. The chart below examines the positive and negative aspects of the various policy options.

RVAA Policy Options

Policy Options	Pros	Cons
<p>Option 1: Adopt the state model policy</p> <p>The legislation included a state model policy that school districts may choose to adopt. Even districts that adopt the state model policy will have to customize the policy by making choices prompted by the policy.</p>	<ol style="list-style-type: none"> 1. May satisfy some local community groups. 2. Unlikely that school districts will be sued by proponents of the legislation. 3. Deemed in compliance with state law. 	<ol style="list-style-type: none"> 1. Goes beyond what the statute requires. 2. Includes expansive opportunities for student speech, which may lead to challenges. 3. Only speakers who hold positions of honor, most of which are elected, are allowed to speak. As in <i>Santa Fe</i>, this may have the unconstitutional effect of limiting minority viewpoints or being “an improper majoritarian election on religion.” 4. Key terms like <i>school event</i> and <i>publicly speak</i>, which trigger the requirement to create a limited public forum are not defined. 5. As implemented, the model state policy may be interpreted by courts as school-sponsored speech instead of private speech. 6. Although described as a “safe harbor,” opponents of the state model policy may sue school districts that adopt it. In the event of a challenge, the state’s attorney general could defend the constitutionality of the statute, but not the policy choices of individual school districts.

<p>Option 2: Adopt an alternative policy</p> <p>Alternatives to the state model policy are available. For example, in its <i>Starting Points on Student Expression</i>, TASB offered an alternative policy based on the state model policy. Several private law firms have also offered language to assist districts in further customizing the TASB alternative policy.</p>	<ol style="list-style-type: none"> 1. Complies with the RVAA. 2. Some alternatives may be “substantially identical” to the state model policy. 3. May limit the number of speaking venues so there are fewer challenges. 4. May allow any student to volunteer to eliminate majoritarian elections. 5. TASB alternative defines <i>school event</i> and <i>publicly speak</i> to clarify there is a limited public forum. 6. May restrict eligibility for students placed in disciplinary settings. 7. May add limits on speech that would result in a material or substantial disruption of school operations. 	<ol style="list-style-type: none"> 1. Unless the alternate is “substantially identical” to the model policy, it is not explicitly deemed to be in compliance with the statute. 2. As implemented, an alternate policy may be interpreted by the courts as school-sponsored speech and not private student speech.
<p>Option 3: Do not adopt a policy</p> <p>Some school districts hope to avoid potential litigation by taking no action on the legislation until there is better guidance as to how the legal issues will be resolved. Others believe existing school policies cover the requirements of the law and may adopt a resolution to that effect.</p>	<p>Other school districts can serve as the “test case” on this issue.</p>	<ol style="list-style-type: none"> 1. No quick judicial determination as to whether the statute and policy are lawful. 2. Districts with no policy may be sued by RVAA proponents. 3. The district may not have insurance coverage if determined not to be in compliance with state law. 4. If sued, individual school officials may lose good faith qualified immunity.

Implications for Student Addresses

Student speeches at assemblies, graduation ceremonies, and other school events cannot contain sectarian or proselytizing language if the speeches are properly characterized as government speech or school sponsored speech.

If student expressive activity is part of school-sponsored events or publications that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school, then school administrators may exercise editorial control over the style and content of student speech so long as their actions are reasonably related to legitimate pedagogical concerns. *Hazelwood Indep. Sch. Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988). Editorial control may be necessary to eliminate religious expression that would violate the Establishment Clause.

For example, a California appellate court permitted a school district to edit the content of commencement addresses because the content of the speech was sectarian. The court held that the degree of school sponsorship and control over the speech made it state-sponsored speech. Consequently, to permit students to deliver sectarian speeches would have violated the Establishment Clause. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000); see also *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (upholding a school district's decision to edit proselytizing text from a student's graduation speech).

In *Corder v. Lewis Palmer School District No. 38*, the Tenth Circuit Court of Appeals upheld a district's action in forcing a student to apologize after she gave a proselytizing speech at graduation when she had given the school principal a different speech to review before graduation. The speech she submitted for review did not mention religion, but she delivered the following message:

Throughout these lessons our teachers, parents, and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006.

Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219, 1222–23 (10th Cir. 2009).

Corder was reprimanded by the campus administrator, who said she had to deliver an apology before she could receive her diploma. She did not apologize for the content of her message, but she did explain publically that she delivered the statement without prior approval. The court concluded that, since the student's speech at the graduation ceremony bore the imprimatur of the school, so did her apology. The district retained control over both. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009).

The very act of exercising editorial control to remove religious content may appear to be hostile toward religion. Courts, however, acknowledge that compliance with the Establishment Clause is a compelling reason to exercise editorial control. The U.S. Supreme Court has stated that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). As a result, when a principal refused to allow students to perform a religious song, Celine Dion's "The Prayer," at a graduation ceremony, the Third Circuit Court of Appeals concluded that the principal's decision had a valid secular purpose and was not merely hostile toward religion. *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 587 F.3d 597 (3d Cir. 2009).

When a student speaks as a private citizen in a context that does not bear the imprimatur of the school district, school officials may not censor protected free speech absent a compelling reason.

The U.S. Supreme Court has reiterated the basic principle 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." *Santa Fe v. Doe ex rel. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. of Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 250 (1990)). If student speech is offered and perceived as purely private speech, the school district's interest in exercising editorial control is greatly reduced. If student speech does not bear the imprimatur of the school district, school officials may not impose viewpoint-based limitations, including restrictions on religious expression, unless school officials reasonably conclude the speech will "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

For example, in a Montana case, a valedictorian was invited to give a speech during the graduation ceremony. Neither the school district nor the high school had written guidelines for student speakers addressing the content of valedictory speeches. The students were told their remarks had to be "appropriate, in good taste and grammar, and should be relevant to the closing of [their] high school years." The style and topic of the speech was left to each speaker.

I learned to persevere these past four years, even through failure or discouragement, when I had to stand for my convictions. I can say that my regrets are few and far between. I didn't let fear keep me from sharing Christ and His joy with those around me. I learned to impart hope, to encourage people to treat each day as a gift. I learned not to be known for my grades or for what I did during school, but for being committed to my faith and morals and being someone who lived with a purpose from God with a passionate love for Him.

The student was told to eliminate the references to religion in her remark even though a district policy on Organization and Content for Commencement Speeches stated: "The school administration shall not censor any presentation or require any content, but may advise the participants about appropriate language for the audience and occasion. Students selected to participate may choose to deliver an address, poem, reading, song, musical presentation, prayer, or any other pronouncement of their choosing." The policy also required a disclaimer that specifically acknowledged that the views of the speakers, including religious viewpoints, were the views of the speakers and were not offered on behalf of the school district. Nevertheless, the student was not permitted to speak because she would not remove the religious references from her speech. *Griffith v. Butte Sch. Dist. No. 1*, 244 P.3d 321, 325-27 (Mont. 2010).

The Montana Supreme Court concluded that the student's cursory references to her personal religious beliefs in her graduation speech would not reasonably be perceived as religious endorsement by the school district. The court distinguished the Cole case from California, in which school officials declined to allow an invocation and valedictory speech that were sectarian and proselytizing and, therefore, "by definition, designed to reflect, and even convert others, to a particular religious viewpoint." *Cole v. Niemeyer*, 228 F.3d 1092, 1103 (9th Cir. 2000) (quoting *Doe ex rel. v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir.1999)). The Montana student's remarks were brief, mentioning her personal beliefs three times in a two-page speech without eliciting audience participation or affirmation. Moreover, in light of the detailed disclaimer, no reasonable audience member would think the speech bore the imprimatur of the school district. Finally, the school district violated its own policy against censoring the students' speeches by requiring the student to remove the words "God" and "Christ" from her speech.

Consequently, the Montana school district violated the student's right to freedom of speech under the First Amendment of the United States Constitution when it impermissibly censored the content of her valedictory speech based on the viewpoint she expressed. *Griffith v. Butte Sch. Dist. No. 1*, 244 P.3d 321 (Mont. 2010).

DOE guidance: A primary purpose of the Texas RVAA was to indicate in state law and local school district policies that school districts do not sponsor student speech, including prayer, at events such as graduation. See Tex. Educ. Code §§ 25.152, .156 (requiring disclaimers in local policy). In this respect, the RVAA echoes the U.S. Department of Education's (DOE) [Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools](#). The guidance provides that when student speakers are selected based on genuinely neutral and even-handed

criteria, and when student speakers selected under such criteria retain primary control over the content of their expression, such student speech is not attributable to the school and may not be restricted for either its religious or anti-religious content. In order to receive funds under the Elementary and Secondary Education Act, local school districts must certify that their local policies do not prevent or deny participation in constitutionally protected prayer as set forth in the DOE guidance.

Disclaimers required: Both the RVAA and the DOE guidance rely on disclaimers and local school district policies to declare that student speech is not school sponsored. The DOE guidance says, “To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker’s and not the school’s.” U.S. Dept. of Ed., [Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools](#). If, however, a legal challenge arises, the existence of the disclaimer may not protect the district from an Establishment Clause violation. *See, e.g., Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003), *cert. denied*, 540 U.S. 817 (2003) (“Although a disclaimer arguably distances school officials from ‘sponsoring’ the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.”) If, then, the circumstances surrounding a ceremony do not convince a court that a public forum was in fact established, use of a disclaimer will not shield a district from liability.

Limit to free speech: Regardless of how student speech is categorized, schools always have the right to prevent students from delivering speech that is vulgar, lewd, profane or offensive to the school environment, even if the message would not be considered inappropriate outside of an educational environment.

TASB-recommended policy language prohibits categories of content that have been determined in prior court cases to be inappropriate in the public school setting:

- **Vulgarity:** The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
- **Threats to health or safety:** The materials endorse actions directly endangering the health or safety of students. *Ponce ex rel. E.P. v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007).
- **Promotion of illegal drugs:** The materials promote illegal use of drugs, alcohol, or a controlled substances. *Morse v. Frederick*, 551 U.S. 393 (2007).
- **Harm to rights of others:** Distribution of the materials would violate the intellectual property rights, privacy rights, or other rights of another person. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968).
- **Defamation:** The materials contain defamatory statements about public figures or others. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

- **Inciting lawless action:** The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- **Hate speech:** The materials are hate literature or similar publications that scurrilously attack ethnic, religious, or racial groups or contain content aimed at creating hostility and violence, and the materials would materially and substantially interfere with school activities or the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).
- **Disruption:** There is reasonable cause to believe that distribution of the nonschool literature would result in material and substantial interference with school activities or the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

Attempting to disavow responsibility for student speech through disclaimers and eliminating prior review does not eliminate all risk of a legal challenge.

Under both state and federal guidance school districts can take steps to create free speech opportunities for students to deliver personal messages to audiences at school-sponsored events. Districts do this by using clear and consistent disclaimers and by being truly “hands-off” in reviewing or guiding the content of the students’ speech. Naturally, taking this approach raises the possibility that some speech will be controversial. For example, religious speech that expresses the viewpoint of a minority religion may cause controversy in some communities. Parents who initially supported the idea of student speeches may withdraw their support upon learning that their children have been exposed to viewpoints that differ from their own. In addition, school districts face the risk of an “as applied” challenge to free speech policies. A family professing a minority religious view in a school district that creates limited public forums that, over time, are used solely or primarily by students professing majority religious views may be able to establish that a school district’s free speech policy nevertheless violates the First Amendment as interpreted by the U.S. Supreme Court in *Santa Fe Independent School District v. Doe*. *Santa Fe Indep. Sch. Dist. v. Doe ex rel. Doe*, 530 U.S. 290 (2000).

What’s the bottom line?

Unfortunately for school officials, there is no risk-free option in this area. Taking action to edit or curtail religious speech raises the risk of a free speech challenge from speakers. On the other hand, failing to prevent religious speech raises the risk of an Establishment Clause challenge from constituents who are offended by religious content. School districts should work with their school attorneys prior to graduation season to limit these risks to the extent possible. Once the district’s leadership has consulted legal counsel and agreed upon an approach, the administration needs to communicate that approach to the campus-level administrators charged with overseeing graduation events. Good training and consistent communication and follow-through for campus administrators is an essential part of reducing legal risks in this area.

Option 1: Stay in Control	Option 2: Create a Free Speech Forum
<p>Tell students they are speaking as school representatives</p> <p>Set clear parameters for their speech</p> <p>Review speeches in advance</p> <p>Exercise editorial control</p> <p>Edit as necessary to avoid Establishment Clause issues</p>	<p>Plan ahead</p> <p>Establish neutral criteria for selecting speakers</p> <p>Use neutral terminology for openings/closings</p> <p>Consistently publish disclaimers</p> <p>Do not engage in prior review</p> <p>Censor speech only if it is not subject to protection in school environment</p>

Implications for Student Prayer

Although the U.S. Supreme Court has ruled that school officials cannot arrange for prayer to be included in a graduation ceremony, questions remain about the circumstances under which a student might independently elect to include prayer as part of his or her remarks during such an event.

A public school program or ceremony may not include an invocation or benediction if the choice to include prayer on the program is made by school officials.

The U.S. Supreme Court overturned a Rhode Island school district’s policy allowing principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. The Court held that the school district’s involvement created a state-sponsored and state-directed religious exercise in a public school. *Lee v. Weisman*, 505 U.S. 577 (1992). The practice of inviting clergy violated the Establishment Clause, even though the prayers were not offered by a school official.

Some judicial precedent would allow for prayer that is truly “student initiated.”

While relevant court decisions do not provide a clear answer, Texas law and guidance from the DOE indicate that it is possible for school districts to avoid sponsoring student speech at school events. If student speech is not school-sponsored, the religious speech, including prayer, is not unconstitutional.

Student-initiated graduation prayer approved by Fifth Circuit: Before the U.S. Supreme Court’s decision in *Santa Fe*, below, the Fifth Circuit Court of Appeals held that a school board may permit the graduating senior class, with the advice and counsel of the senior class sponsor, to choose student volunteers to deliver nonsectarian, non-proselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996).

Supreme Court ruled student prayers could be school-sponsored: After the Fifth Circuit decided *Jones*, the U.S. Supreme Court decided *Santa Fe Independent School District v. Doe*. In *Santa Fe*, the Court held that a school district's policy permitting a student volunteer to provide an invocation before games violated the Establishment Clause due to several factors. First, the invocations in Santa Fe ISD were authorized by official policy and took place on government property, at government-sponsored events, and under the supervision of school employees. As a result, the Court refused to conclude that the pregame invocations could be considered private speech. In addition, even though attendance at football games was not mandatory, the Court felt that students should not be forced to choose between attending and facing what might be a personally offensive religious ritual. Finally, the Court took issue with the school district's election system for choosing a student speaker. Electing a student speaker would tend to result in the majority viewpoint being selected, to the exclusion of minority viewpoints. The Court held that the school district's policy "is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." Consequently, a public school may not permit school-sponsored prayer to be given over the public address system at school or school events, even if the prayer is given by a student. *Santa Fe Indep. Sch. Dist. v. Doe ex rel. Doe*, 530 U.S. 290, 317 (2000).

Student-initiated graduation prayer after *Santa Fe*: To many, the U.S. Supreme Court's reasoning in *Santa Fe* seems to prohibit even student-led prayer at graduation. At least one federal court in Texas has opined that the reasoning in *Santa Fe* applies equally to student-led prayer at graduation. *See, e.g., Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735 (W.D. Tex. 2007) (considering the impact of *Santa Fe* and determining that plaintiffs who complained about a majoritarian election on graduation prayer had alleged a viable claim). Significantly, however, the U.S. Supreme Court was asked but declined the opportunity to reverse the Fifth Circuit's decision regarding graduation prayer in the *Santa Fe* appeal. *Doe ex rel. v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *cert. denied in relevant part*, 528 U.S. 1002 (1999) (upholding student-initiated prayer policy for graduation). Perhaps the Court's decision did not undermine existing Fifth Circuit precedent allowing student-organized, student-led, nonsectarian, non-proselytizing prayer. In fact, after *Santa Fe*, another federal circuit court, the Eleventh Circuit Court of Appeals, affirmed *en banc* an earlier opinion upholding a policy permitting seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies. In the court's opinion, the student messages made possible by this policy need not be constrained because the messages would constitute purely private speech. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).

Ultimately, the key distinction remains whether the prayer is private speech or school-sponsored, as described above. If a student's speech is government speech or school-sponsored speech, prayer is not permitted. If student speech is offered and perceived as private speech, religious content, including prayer, is likely to be permissible. School districts should take steps to:

- open speaking opportunities to students of multiple viewpoints;

- clarify that the speaking opportunities may be used for any purpose appropriate to the occasion, not exclusively for prayer (in other words, have an “opening” rather than an “invocation”);
- disclaim responsibility for the student speech, if that is the intent of the school district; and
- avoid holding a majoritarian election to decide whether to pray or not to pray.

Prayer in other settings: For the reasons described above, public schools may not sponsor baccalaureate services or prayer breakfasts. To do so would implicate the Establishment Clause. Schools may, however, allow private groups to sponsor the services in accordance with local policies governing the use of school facilities by outside groups. *Shumway v. Albany County Sch. Dist. No. 1 Bd. of Educ.*, 826 F. Supp. 1320 (D. Wyo. 1993) (mem.); *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).

For more information on student prayer in other school settings, see [Student Religious Expression](#). For information on prayer at board meetings see [Prayer at School Board Meetings](#).

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Community/Religion-in-the-Public-Schools/documents/student-speakers-at-school-events.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoolawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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