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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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GRADUATION PRAYER REVISITED**Overview**

The month of June is rapidly approaching and in a few weeks public school districts across the country will be holding high school graduation ceremonies. The capstone of a long educational journey, graduation represents a major sense of accomplishment for all graduates and their families. Parents, grandparents, aunts, uncles, other relatives, and friends will proudly watch as the new graduates walk across the stage and receive their diploma. As Justice Kennedy opined in Lee v. Weisman (1992), “graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.”

In past years a potential for disharmony in graduation ceremonies existed; a disharmony caused by two of graduation’s traditional mainstays—the invocation and the benediction. However, given the past fifteen years of court decisions and subsequent legal guidance given by attorneys to public school officials, the chances of graduation prayer issues springing up in 2008 are not as great as in past years. In my view while this may be the prevailing situation school officials still need to be diligent and take a proactive (preventive) approach.

The purpose of this commentary is twofold. First, the commentary will briefly revisit and discuss the constitutional issues associated with graduation prayer in public high schools. Not intended as a comprehensive restatement of the law, this discussion will focus on a sampling of past decisions of the United States Supreme Court. Second, recommendations for school system policy and school-based administrative procedures will be made.

First Amendment Issues

While the Supreme Court made it clear in Tinker v. Des Moines (1969) that teachers and students do not shed their First Amendment rights to speech and expression at the school house gate, more recently the Supreme Court has held that public school officials and not students decide what is or is not acceptable speech and expression in school and at school-sponsored activities. Bethel School District v. Fraser (1986) What is more,

public school officials and administrators possess the legal authority to set the time, place, and manner of all student speech and expression activities (including those that are religiously oriented) that occur on school grounds and at school-sponsored events. Vacca and Boshier (2003) However, First Amendment jurisprudence never has permitted public school officials the discretion to either include or exclude exercises of speech and expression on school grounds or at school sponsored activities solely on the basis of personal tastes, or simply because they (school officials) “disagree with it.” Morse v. Frederick (2007) Such decisions must be based on “reasonable pedagogical concerns.” Hazelwood v. Kuhlmeier (1988) At the same time, speech and/or expression that is “otherwise permissible cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint....this constitutes impermissible viewpoint discrimination.” Good News Club v. Milford Central School (2001)

The Establishment Clause Dominates: In the early 1970’s, when the Supreme Court established the three-pronged Lemon v. Kurtzman (1971) standard (secular purpose, primary effect, and excessive entanglement), the Establishment Clause and the Free Exercise Clause were made to represent competing and not compatible interests. It must be emphasized, however, that the Court itself recognized the difficulty in completely separating church and state. As Justice White stated, “Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” Lemon (1971)

Free Exercise and Free Speech. The First Amendment also guarantees that an individual’s free exercise of his/her religious beliefs shall not be abridged by government action. In effect an individual is free to believe or not believe what he/she wishes. However, government “may restrict the practice of one’s religion if it harms or abuses the rights of others.” Vacca and Boshier (2003) It also must be emphasized that government (e.g., public school board) regulations and/or prohibitions must not place an unreasonable, arbitrary, or capricious burden on an individual’s exercise of his/her *bona fide* religious beliefs and practices.

A recent example of a free exercise/establishment-type case involved a public school system in Washington State, where a high school graduation controversy arose involving one of the school’s musical groups. Not specifically focusing per se on graduation prayer, this case involved the selection of music to play at a public high school’s 2006 graduation. Nurre v. Whitehead (2007)

A student group, the wind ensemble, decided to play an instrumental version of the “Ave Maria.” Citing a concern for the “religious nature” of the musical selection (by policy all music had to be secular), school officials denied the group’s request. Subsequently the students (some of them seniors ready to graduate) went into a federal district court where they unsuccessfully claimed that school officials violated their First Amendment right to free speech and the Fourteenth Amendment’s Equal Protection Clause. In addition, the student’s alleged that school officials violated the First Amendment’s Establishment Clause. Relying on Lemon (1971) the court held that the denial decision: (1) had a secular purpose, (2) neither advanced nor inhibited religion, and (3) was not excessively entangled with religion. Moreover, said the court, school officials did not demonstrate any “hostility” toward religion in making their decision. Nurre (2007)

School-Sponsored v. School-Sanctioned Activities. In recent years the courts have demonstrated a growing sensitivity to the notion that a “reasonable observer” might perceive an activity to be “school-sponsored or school-sanctioned.” Morse v. Frederick (2007) In my view the terms *school-sponsored* and *school-sanctioned* are very different, and must be factored into an issue analysis dealing with graduation prayer.

An activity or event that is formally *sponsored* by a public school system is one thing, Santa Fe I.S.D. v. Doe (2000), while another activity or event not officially sponsored by a school system (e.g., a community event) still might be perceived by those observing the activity or event as bearing the school system's official imprimatur (*school sanctioned*) Morse v. Frederick (2007) It is this second theory (viewer perception) that holds the most potential for producing issues involving formal prayers of any kind (including voluntary, student-initiated prayers) being permitted as a part of an public high school graduation program. In my opinion this "observer perception" theory actually builds on the *endorsement test* created more than two decades ago by the Supreme Court in the "Nativity in the public square" decisions. Lynch v. Donnelly (1984)

Lee v. Weisman (1992)

While over the years the United States Supreme Court has handed down several benchmark decisions dealing with religion in public schools [see for example, Engel v. Vitale (1962), and School District of Abington Township v. Schempp (1963)], it was not until fifteen years ago that the Court spoke directly to graduation prayer. As Professor Martha McCarthy reminds us, "The status of graduation devotionals was somewhat unclear until the Supreme Court rendered Lee v. Weisman in 1992, invalidating a Rhode Island school district's policy that permitted principals to invite clergy members to deliver invocations and benedictions at middle and high school graduation ceremonies. The Court held that the policy had a coercive effect in that students felt peer pressure to participate in the devotionals during the school-sponsored graduation ceremony." McCarthy (2005) In analyzing school related issues, courts always have been sensitive to the age, maturity level, and impressionability of students, as well as to the possible presence of elements of indoctrination, peer pressure, and religious proselytizing. Agostini v. Felton (1997)

Policy Implications

As stated at the outset of this commentary, the possibility of graduation prayer being an issue in 2008 is not as great as it was in past years. However, a need still exists for school officials and administrators to be proactive in foreseeing and mitigating problems.

More than a decade ago, my late research partner H.C. Hudgins, Jr., and I published an extensive article in *The American School Board Journal* (vol.181, no. 5) dealing exclusively with graduation prayer. The intent of our article was to make recommendations for implementing administratively sound school board policies and school-based administrative practices in light of the United States Supreme Court's seminal decision in Lee v. Weisman (1992). In my view these recommendations remain relevant and warrant repeating. They are taken directly from our article and briefly summarized as follows:

1. Review your existing policy on graduation prayer, and be certain actual administrative practice conforms to that policy.
2. If you do not have a graduation prayer policy, put one in place and be sure that it is circulated and explained to all administrators, teachers, students, and parents.
3. Take a sounding on the attitudes of all segments of the school community and their expectations for graduation.
4. Suggest that school principals involve the graduation class in planning the ceremony. Principals might also consider holding discussion forums where students can hear and respond to various views on graduation prayer.
5. Remove all official support for any form of prayer or alternative to prayer as a part of the graduation ceremony.

6. Put into place a formal mechanism for dispute resolution that is activated whenever a problem arises.
7. Recognize that although graduation is a school-sponsored event, it should be student-centered. School personnel must provide some supervision and direction but should loosen unnecessary controls that might provoke legal action.
8. Above all, reinforce the need for all administrators, staff members, and students to practice understanding and tolerance so that people from different backgrounds and cultures may be accommodated without any attempt to establish religion. Vacca and Hudgins (1994)

In recent years some school systems have, in the spirit of accommodation of diversity, utilized a moment of silent reflection and contemplation at the opening and closing of the graduation ceremony. Other school systems have asked the senior class to vote regarding the inclusion of voluntary student-led prayer as a part of the ceremony. In my view whatever the alternative public school officials, administrators, and staff must not be pervasively involved to a point where the activity is perceived as a pretext for including sectarian prayer in the graduation ceremony.

Three final thoughts are in order. First, because one cannot accurately predict what a student speaker might do or say once he/she gains access to the microphone, school board policy must make it clear that graduation speakers, not school officials, are solely responsible for the content of their remarks. Second, the mere inclusion of a religious reference does not automatically convert an entire graduation speech into a religious devotional. Finally, carefully review your graduation policy and ceremony plans with your school attorney.

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Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.