



**An Analysis of the
“Guidance on Constitutionally Protected Prayer
in Public Elementary and Secondary Schools”
Issued by the U.S. Department of Education on February 7, 2003**

In 1995, President Clinton directed the United States Secretary of Education to provide all public school districts in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. On February 7, 2003, the Guidelines were revised and reissued by Secretary Rod Paige, as part of the implementation of the No Child Left Behind Act of 2001. The revised document – entitled the “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools” – is not an objective presentation of the state of the law. Rather, it is an unprecedented effort to coerce school districts, through the threat of the withholding of federal funds, to comply with a selective and inaccurate interpretation of constitutional law.

518 C Street, N.E.

Washington, D.C. 20002

(202) 466-3234 phone

(202) 466-2587 fax

americansunited@au.org

www.au.org

The Guidance improperly asserts that teachers have the right to participate in religious activities on school grounds. The Guidance states that teachers and other school employees are prohibited from encouraging or discouraging prayer, and from actively participating in such activity with students, “[w]hen acting in their *official* capacities.” The Guidance states that teachers may take part in such activities “where the overall context makes clear that they are not participating in their official capacities.”

The suggestion in the Guidance that teachers can participate in religious activities with students when they are doing so in their “unofficial” capacity lacks any basis in law. Courts have uniformly held that teachers may not participate in religious activities with students at any time relevant to the school day. *See, e.g., Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding that coach’s practice of leading and participating in prayers with basketball team before and after games is unconstitutional); *Steele v. Van Buren Pb. Sch. Dist.*, 845 F.2d 1492 (8th Cir. 1988) (affirming that band teacher could not lead student band in prayer before rehearsals and performances); *Pelozza v. Capistrano Unified Sch. Dist.*, 782 F. Supp. 1412 (C.D. Cal. 1992), *aff’d, rev’d on other grounds*, 37 F.3d 517 (9th Cir. 1994) (disallowing teacher from discussing his religious views with students during non-instructional time). These cases recognize that during the lunch recess and directly before and after the school day, students perceive teachers to be representatives of the school.

Furthermore, the Guidance states that teachers have the right to meet with other teachers for prayer or Bible study before school or during lunch “to the same extent that they may engage in other conversation or non-religious activities.” The extent to which teachers can engage in religious activity on school grounds, even outside the presence of students, is unresolved. Indeed, the only federal appeals court to consider the question has held that teachers do *not* have a legal right to hold prayer meetings on school property before the school day begins. *See May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105 (7th Cir. 1986). At the same time, a lower court has ruled that it does not violate the Establishment Clause to permit teachers to meet for prayer before school, provided that teachers are allowed to meet for other purposes as well. *See Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp.2d 897, 910 (W.D. Mich. 2000). In

light of the lack of clear guidelines on constitutional requirements in this area, a school district that allows teachers to conduct Bible study on school grounds runs the risk of a challenge by objecting students and their parents. ***Thus, school districts that seek to avoid legal liability, and to comply with the Guidance at the same time, are advised to prohibit all teachers' meetings – religious and non-religious – that are unrelated to school business.***

The Guidance improperly asserts that students may be allowed to choose whether to have prayers at school-sponsored events. The Overview of Governing Constitutional Principles included in the Guidance states that “public school officials may not *themselves* decide that prayer should be included in school-sponsored events,” thereby suggesting that *students* may decide that prayer should be included in school-sponsored events. The Guidance further states that students must be allowed to offer prayer or other religious remarks at graduation ceremonies, student assemblies, and extracurricular activities such as sporting events, when the student-speakers are selected on the basis of “genuinely neutral, evenhanded criteria” and they retain primary control over the content of the expression.

In fact, the courts have been highly skeptical of schemes involving voting mechanisms or other procedures by which students decide on the content of school-sponsored ceremonies. In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000), the Supreme Court struck down a school policy allowing students to vote on whether a student would present a “brief invocation and/or message” before football games and to elect a student from a list of student volunteers to deliver it. Employing a rationale that suggested that prayers of all kinds are impermissible at all school-sponsored events, the Court held that the invocation that was ultimately delivered was not “private speech” because the policy that authorized the remarks was adopted by school officials, the message took place on government property at a school-sponsored event, the election system ensured that minority views would not be heard, and students would be forced to decide between attending the event or being subjected to offensive religious speech. *Id.* at 302-08.

The lower courts are currently in the process of determining the reach of the *Santa Fe* holding. In *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001), the Eleventh Circuit upheld the practice of allowing the senior class to vote on whether a fellow student should be allowed to present a “message,” unrestricted in content, at graduation ceremonies. However, the *Adler* decision is highly controversial, and it is very likely that other circuits, when presented with the same question, will reach a contrary conclusion. This is because many of the factors that led the Supreme Court to strike down the policy at issue in *Santa Fe* were equally present in *Adler*. That is, the prayer was presented pursuant to a school policy, at a school-sponsored event that was arranged and orchestrated by school officials, in a context where all of the proceedings are highly controlled by school officials and are thus likely to be perceived as endorsed by the school. *See Santa Fe*, 530 U.S. at 307-08.

In contrast to *Adler*, the Third Circuit in *American Civil Liberties Union v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996) (*en banc*), struck down a school board policy that allowed senior class officers to poll the graduating class to determine whether their graduation ceremony should include “prayer, a moment of reflection, or nothing at all.” The court recognized that school officials retain a high degree of control over school-sponsored events, and that the remarks in question would thus be perceived by the audience to be endorsed by the school. *Id.* at 1479.

Similarly, in *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003), the Ninth Circuit held that it would violate the Establishment Clause to permit

a student to present a religious speech at a public school graduation ceremony because such a speech would necessarily coerce the participation of dissenters. The court held that such coercion would exist even if the student is selected pursuant to neutral criteria, and even if the school employs a disclaimer. See *id.* By failing to reflect this conflict among the circuits – between *Black Horse Pike* and *Lassonde* on the one hand, and *Adler* on the other – the Guidance presents a grossly distorted description of the caselaw.

Furthermore, while *Adler* held that religious remarks can be presented in certain circumstances at *graduation* ceremonies, no court has ever held that this principle applies to non-graduation contexts such as school assemblies and sporting events. Indeed, some courts have found that graduation ceremonies are distinguishable from these other contexts, and that a prayer that may be permissible in the former context may be impermissible in the latter context. See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999), *aff'd on other grounds*, 530 U.S. 290 (2000) (rationale of earlier decision upholding student-initiated graduation prayer does not extend to football games because that decision “hinged on the singular context and singularly serious nature of the graduation ceremony”).

Indeed, every court to consider the question has held that prayer – whether student-led or faculty-led – is impermissible at school-sponsored athletic games or events. See, e.g., *Santa Fe Indep. Sch. District v. Doe*, 530 U.S. 290, 305-308 (2000) (finding unconstitutional student-led, student-initiated prayer before football games); *Ingebretzen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (finding unconstitutional state statute permitting student-initiated prayer at sporting events); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding that coach’s practice of leading and participating in prayers with basketball team before and after games is unconstitutional); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) (striking down regulation calling for invocations to be held at high school sporting events).

Thus, the Guidance overstates the case when it asserts that the law mandates that prayers must be permitted at school events under certain circumstances. Within the Eleventh Circuit – which consists of Georgia, Alabama, and Florida – prayers may be permitted at graduation ceremonies in certain circumstances, but this holding does not extend beyond the graduation context. Elsewhere in the country, whether prayers may be permitted at graduation ceremonies and/or other school-sponsored events is an unresolved question, and the pronouncements of the Supreme Court and two federal circuits suggest that they may not be.

The Guidance’s directive that students must be permitted to deliver religious remarks at school-sponsored events is limited to those circumstances in which students’ remarks are not subject to pre-review by school officials. But if a school district allows students to give unreviewed remarks at school events, and a student then elects to present a religiously proselytizing speech, the school district would undoubtedly face legal liability along the lines suggested by the Supreme Court’s rationale in *Santa Fe* and the court decisions in *Black Horse Pike* and *Lassonde*. ***Thus, school districts that seek to comply with the Guidance, and to avoid legal liability at the same time, are advised to adopt policies that require school officials to pre-review all students’ speeches, and to omit any religious remarks, for all school-sponsored events.***

The Guidance improperly asserts that students may express their religious beliefs in oral assignments. The Guidance states that students may “express their beliefs about religion in homework, artwork, and other written and oral assignments.” In fact, the existing caselaw on

this question holds precisely the contrary: a school is *not* required to allow religious presentations to be made to other students in the classroom. See *C.H. ex rel. Z.H. v. Oliva*, 990 F. Supp. 341, 352 & n.16 (D.N.J. 1997), *affirmed in part, vacated in part*, 226 F.3d 198 (3rd Cir. 2000) (*en banc*). Because students are a captive audience during classroom instruction, the courts recognize that “Educators are entitled to exercise [] control over . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners [or viewers] are not exposed to material that may be inappropriate for their level of maturity, and 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). Thus, schools should be extremely wary about allowing students to use instructional time to express their religious views to other students because doing so may lead to an Establishment Clause violation. Students may be permitted to present their religious views in written and oral work presented to the teacher, and in discussions with and distributions to other students outside of the classroom during noninstructional time, but they have no constitutional right to present their religious views to other students in the classroom. ***Thus, school districts are advised to adopt policies that recognize teachers’ discretion to protect students from religious indoctrination by other students during instructional time.***

The Guidance punishes students by threatening to withhold federal funds from public schools. Section 9524 of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, requires school districts to certify that they preserve students’ rights to engage in “constitutionally protected prayer.” 20 U.S.C. § 7904(b). In contrast, the Guidance requires district to certify that they are protecting students’ rights “as set forth *in this guidance*.” The former, but not the latter, requirement recognizes that legal standards often vary by jurisdiction, and that requiring a school district to comply with the Guidance may require them to violate governing law. This scenario may place some school districts in the Catch-22 of violating the Guidance and losing federal funding or violating governing case law and suffering legal liability.

Furthermore, the 2003 Guidance states that school districts that do not comply with its terms risk the loss of federal funds. This is unprecedented. Prior to 2003, the Guidelines did not threaten the loss of federal funding for those schools that, on the advice of their counsel or because of the legal requirements peculiar to their jurisdiction, opted to adhere to slightly modified protections of students’ religious rights. Furthermore, the Department of Education lacks the statutory authority to impose this penalty. Section 9524 of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act, requires school districts to certify that they comply with the federal Constitution, but it does not authorize the withholding of funds from districts that do not do so.

Withholding federal funds only serves to penalize students, who rely on such funds to obtain the full panoply of educational services offered in their school district. The sanction violates the spirit of the No Child Left Behind Act, and the Elementary and Secondary Education Act, both of which were enacted to protect and preserve students’ rights. The withholding of federal education funds would harm, rather than benefit, the intended beneficiaries of these statutory provisions. ***School districts are advised to submit a certification – so as not to risk losing federal funding – but to consult with legal counsel before doing so.***

* * * * *

When President Clinton's Education Secretary Richard W. Riley issued the first Guidelines in 1995, he explained that the purpose of the guidelines was to "find new common ground on the important issue of religious freedom consistent with constitutional requirements." The Guidelines recently issued by the Bush administration constitute a grave departure from this tradition of finding common ground. Rather, they selectively present a small handful of cases as the law of the land on legal questions that are, in fact, largely undecided. In order to assist school districts in avoiding the Catch-22 that may be created by the 2003 Guidance, we have suggested above some methods by which school districts can comply with the Guidance and, at the same time, avoid legal liability. We also urge school districts to consult legal counsel to assist in the formulation of policies and procedures.