

SCHOOL LAW ADVISORY

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Constitutional Limits on Graduation and Baccalaureate Ceremonies

By Daniel J. Rose

Many public schools have long included an invocation or benediction in their graduation ceremonies, or have held a baccalaureate service for the graduating class. In recent years, however, decisions by federal courts have called into question whether such practices violate the First Amendment to the United States Constitution, particularly the Establishment and Free Speech Clauses.

Because the United States Supreme Court has not had the opportunity to confront these issues directly, and lower federal court decisions are not uniform, there is no clear answer to the question of whether such practices are permissible under the United States Constitution. There are, however, some basic guidelines and rules for Maine public schools that can be ascertained from recent cases:

It is likely that only invocations or benedictions that do not invoke a deity may be constitutionally included in a public school graduation ceremony;

It is likely that school-sponsored baccalaureate services are unconstitutional, regardless of where they are held;

It is likely that baccalaureate services that are not school-sponsored would be permissible if held off school grounds; and

It is likely that baccalaureate services that are not school-sponsored would be permissible if held on school grounds in accordance with a school's established access policy.

This article discusses each of these difficult areas in an effort to provide guidance to public schools on the scope of their authority and obligations concerning graduations and baccalaureate ceremonies.

Limits on Graduation Ceremonies

The question most often asked concerning public school graduation ceremonies is whether they may include invocations or benedictions. The Court of Appeals for the First Circuit, which controls federal law in Maine, has dealt directly with this issue in Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990). In Weisman, the Circuit Court and the District Court held that a prayer given by a rabbi at a Rhode Island public school graduation, invoking a deity, violated the Establishment Clause of the United States Constitution. Although the Weisman decision has been appealed, it remains the law for Maine public school graduations until the Supreme Court decides otherwise.

An analysis of the constitutional framework in which courts examine this issue, as well as the specific reasoning of the Circuit Court and District Court opinions in Weisman follows.

Constitutional Framework

The Weisman Court looked to the Establishment Clause of the First Amendment to the United States Constitution to determine whether the graduation ceremony at issue was permissible. The Establishment Clause prohibits “laws respecting the establishment of religion.” The United States Supreme Court has set out a three-part test to analyze the constitutionality of a public statute, policy or action. For action by a school district or other state actor to be allowed under the Establishment Clause, the proposed statute, policy or action must first, “have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally [it] must not foster an excessive government entanglement with religion.” [Lemon v. Kurtzman, 91 S. Ct. 2105, 2111 (1971)]

Whether conduct will be upheld in any given situation, however, depends very much on the particular facts of the case. [Lynch v. Donnelly, 104 S.Ct. 1355, 1361-62 (1984)] Thus, a school must analyze its own particular facts to determine if a specific graduation ceremony is likely to violate the Establishment Clause.

Weisman: The Law in the First Circuit

As stated above, the holding of the Court of Appeals decision in Weisman v. Lee controls public school graduations in Maine. In Weisman, the Providence School Committee permitted individual principals to include invocations and benedictions, delivered by clergy, in school graduation and promotional ceremonies. A middle school graduate sued to

prevent a rabbi, chosen by the school, delivering an invocation and benediction at a middle school graduation. Both the rabbi's invocation and benediction invoked a deity.

The District Court held that the graduation ceremony violated the second prong of the Lemon analysis because the invocation and benediction given by the rabbi created a "symbolic union" of the school with religion and religious practices. [Weisman v. Lee, 728 F. Supp. At 68, 71 (D.R.I. 1990)] Indeed, the District Court concluded that the special nature of graduation ceremonies underscored the identification that Providence Public School students could make between the school and religion, and that invoking a deity necessarily implicated religion. According to the District Court, such a "symbolic union" would violate the Establishment Clause by communicating government endorsement of either one religion over another, or the endorsement of religion in general. The Court also stated, however, that nothing in its decision prevented a cleric of any denomination, or anyone else, from giving a secular "inspirational message at the opening and closing of graduation ceremonies." [Id. At 74]

The Court of Appeals of the First Circuit affirmed the decision of the District Court. Judge Bownes, who wrote a separate opinion in the case, stated that the Rhode Island graduation ran afoul of all three prongs of the Lemon test for the following reasons:

The primary purpose of invocations and benedictions at graduations was religious and not secular;

It is "self-evident" that a prayer given by a religious person chosen by a public school communicates a message of government endorsement of religion; and

The graduation excessively entangled the school with religion because the school chose the speaker and, in essence, had control over the content of the prayer.

One judge dissented, arguing that the case was more similar to the Supreme Court decision permitting prayer at the start of legislative sessions, Marsh v. Chambers, 103 S. Ct. 3330 (1983), than the Supreme Court decisions forbidding prayer in school, Engle v. Vitale 82 S. Ct. 1261 (1962) (daily prayer).

The Circuit Court, however, specifically rejected this logic, noting that Marsh involved unique circumstances that compelled the Supreme Court to conclude that the Constitution did not forbid prayers in state legislative sessions. Thus, under Weisman, public school graduations in Maine at which there are invocations or benedictions invoking a deity would violate the Establishment Clause of the United States Constitution.

The parties to the Weisman case have appealed the Court of Appeals' decision to the Supreme Court. Because the Supreme Court will not likely hear the case until after this

year's graduations take place, Maine public schools must abide by the Weisman decision unless and until the Supreme Court overturns it.

Limits on Baccalaureate Services

The following questions remain concerning baccalaureate services:

- May a public school sponsor a baccalaureate service?
- May an independent group hold a baccalaureate service off school grounds?
- and
- May an independent group hold a baccalaureate service on school grounds?

The answers to these questions involve the Establishment Clause analysis discussed above, as well as the Free Speech Clause of the First Amendment.

School-Sponsored Baccalaureate Services

Given the reasoning of the Court of Appeals in Weisman, there is little reason to believe that a court would permit a school-sponsored baccalaureate service where a deity is invoked. A court would likely hold that such a ceremony violates all three prongs of the Establishment Clause test. In fact, a court would likely be more apt to hold a baccalaureate service unconstitutional than a graduation ceremony. First, the tone of the entire baccalaureate service is often religious, as opposed to small portions of the graduation ceremony containing either an invocation or benediction. Furthermore, baccalaureate services in Maine have historically had a religious overtone. For these reasons, the school's purpose for having a baccalaureate service will appear to be religious, and the community and the students are likely to perceive an association between the school and religion in a school-sponsored baccalaureate service.

This conclusion does not hinge on where the school-sponsored baccalaureate service is held, since the community is likely to have similar reactions regardless of where the school-sponsored event is held. Thus, a school-sponsored baccalaureate service that invokes a deity will likely violate the Establishment Clause.

Independent Baccalaureate Services on School Grounds

Given the likelihood that school-sponsored baccalaureate services are not constitutionally acceptable, many schools have asked whether independent baccalaureate services can be held on school grounds. The determination of whether an independent baccalaureate service on school grounds is constitutionally permissible depends to a great degree on the facts of each particular case, and involves both the Establishment and the Free Speech Clauses.

Establishment Clause Limits

To protect against a violation of the Establishment Clause, a school must do its best to prevent communicating school support of religion by completely divorcing itself from the proposed baccalaureate service. This may be achieved by taking such steps as:

- Not lending the school name to the program;
- Not giving any assistance to the group holding the baccalaureate service;
- Not supervising the preparations;
- Not permitting students to set up the facility during time when the school is responsible for the students;
- Discouraging staff from participating actively in the service itself;
- Not permitting access to the facilities except in accordance with its standard procedure for allowing organizations to use facilities.
- Informing staff and students that the school has no involvement in the ceremony and that their participation is solely voluntary and a private matter.

Although a school may still face legal challenge if a church group uses the school's facilities for a private baccalaureate service even when the school has no involvement in the service, recent trends in Establishment Clause cases suggest that such use would be permissible. [Grace Bible Fellowship v. M.S.A.D. No. 5, No. 89-0275-B (D.Me. 1990)]

Free Speech Clause Limits

The Free Speech Clause may even require a school to allow the use of its facilities by private religious groups for one-site independent baccalaureate services. In essence, the Free Speech Clause sharply restricts the right of the government to impose limits on the use of "public forums." [United States v. Kolinda, 58 U.S.L.W. 5013 (1990)] Although public school facilities are not considered traditional public forums, a school may create a "designated" public forum by permitting indiscriminate access to its facilities by non-school groups. [Grace Bible Fellowship, Inc. v. M.S.A.D. No. 5, No. 89-2075-B (D. Me. 1990)]

In Grace Bible, the District Court for the District of Maine held that M.S.A.D. No. 5 could not constitutionally deny a church's application to use the school's facilities for a Christmas dinner after school hours. The Court held that if a school has created a designated public forum, it may not exclude groups because of the content of the group's message, and, in particular, it may not forbid religious groups from using the school facilities. Other courts have suggested the contrary, yet the Grace Bible decision controls in Maine. [Deeper Life Christian Fellowship v. Board of Education, 852 F.2d 676 (2d. Cir. 1988) (school could exclude religious groups)]

Thus, Maine schools that have allowed most groups to meet on school grounds may find that they can not constitutionally prohibit access to school facilities by religious groups.

The determination of whether a school has created a “designated” public forum, however, depends heavily on the individual school’s access policy and practice. Any questions on this point should be referred to counsel.

If a school must allow a religious group to meet on school grounds, the school may not choose between religious messages in order to determine what type of programs could occur. Such an examination into the content of religious programs and practice would likely violate the Free Speech Clause. Such a practice would also likely violate the Establishment Clause by excessively entangling the school with religion. Thus, if a school has created a designated public forum that would permit use of its facilities by religious groups, the school would likely have to allow a private baccalaureate service on school grounds if requested. Even then, however, the school would still have to divorce itself fully from the service in order to reduce the risk of an Establishment Clause violation. This is clearly a tricky balance.

In sum, a school that permits, but is not at all involved in, a baccalaureate service held on school grounds may not violate the Establishment Clause. In addition, under the Free Speech Clause, the District Court’s decision in Grace Bible may actually require a school to permit use of school facilities by a church group for a baccalaureate service after school hours if a designated public forum otherwise exists. The decision in Grace Bible has been appealed, however, and courts have not yet resolved the potential conflict between the Establishment Clause and the Free Speech Clause.

Independent Baccalaureate Services Off School Grounds

The balance described above is less tricky for baccalaureate services sponsored by independent groups off school grounds. An independent baccalaureate service sponsored by local religious groups would not likely violate the Establishment Clause because the school simply has no involvement in the matter. Indeed, it would be difficult for a court to hold a school accountable for an event that it had no power to control. There would be no state actor or action for the court to look at in its review if a school were completely divorced from an independent baccalaureate service occurring off school premises.

Thus, it is likely that the Establishment Clause would not be violated in such a situation. Schools should recognize, however, that a court would likely look closely at whether the

school had any involvement. As with the other situations discussed above, schools should studiously avoid involvement with religious ceremonies, on or off school grounds.