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Fourth Circuit Rules Public Bodies May Open Meetings With Prayer

The Fourth Circuit United States Court of Appeals' recent decision in Wynne v. Town of Great Falls, South Carolina affirms the right of public bodies, including school boards, to open their meetings with a ceremonial, non-sectarian prayer. A three-judge panel of the Court of Appeals said that while a public body "generally may invoke Divine guidance for itself before engaging in its public business," the public body cannot "exploit this prayer opportunity to 'affiliate' the Government with one specific faith or belief in preference to others."

By way of background, the Town Council (Council) of Great Falls, South Carolina, routinely opened its meetings with a prayer, which concluded with "in Christ's name we pray." Darla Wynne, a citizen of the community and follower of the Wiccan faith, began regularly attending Council meetings in 1999. Although Ms. Wynne initially took part in the prayer, including standing and bowing her head, she eventually objected to the aforementioned practice and asked that instead, the Council's prayers reference only "God," or that the Council set up a way for members of different religions to be allowed to offer the opening prayers. To put it mildly, the Council was not supportive of Ms. Wynne's request. In fact, the mayor indicated in a public meeting that the Council had always opened its meetings with specifically Christian prayers and would not change because of Ms. Wynne.

After Ms. Wynne requested that the opening prayers be modified, the Council began restricting her speaking time at its meetings and began treating her differently than other citizens. For example, at one meeting, the Council would not permit Ms. Wynne to participate after she arrived a few minutes late in order to avoid the specifically Christian prayer, even though she had met the other requirements such as signing up in advance to speak at the meeting. Additionally, citizens in the community began referring to Ms. Wynne as a "Satanist," ostracizing her, and threatening her welfare.

In August 2001, Ms. Wynne filed a lawsuit requesting that the Council be required to replace Christian prayers with reference to a generic deity, such as "God." After hearing arguments, the U.S. District Court issued an injunction banning the Council "from invoking the name of the specific deity associated with any one specific faith or belief in prayers given at the Town Council meeting."

On appeal, the Fourth Circuit agreed. Specifically, the Court of Appeals determined that the Council's prayers violated the Establishment Clause of the First Amendment to the U.S. Constitution because they promoted Christianity over all other religions. The Fourth Circuit also ruled, however, that public officials may offer brief invocations before engaging in public business, as long as such invocations are "non-sectarian" and "non-proselytizing." It also indicated, without expressly deciding, that public bodies likely would not violate the First Amendment if they allowed members of various religions to offer brief prayers on a rotating basis, primarily because no religion would be "advanced" or "disparaged" by the public body through such prayers.

In light of this recent Fourth Circuit decision, which is binding in South Carolina, school boards that choose to open their meetings with prayers should generally ensure that any prayers offered are non-sectarian and non-proselytizing. In other words, school boards should ensure that such prayers do not promote or advance any one specific religion, including Christianity. As the Court of Appeals stated the point, the school board "cannot exploit this prayer opportunity to affiliate the Government with one specific faith or belief in preference to others."

Alternatively, school boards may choose to invite clergy or members of the community from different faiths to offer brief invocations on a rotating basis. Obviously, the decision of whether or not to open public meetings with a prayer is a serious one that may require thoughtful consideration and deliberation of the various options.

Fourth Circuit Permits Distribution of Religious Flyers

The Fourth Circuit United States Court of Appeals recently determined that a Maryland school district's refusal to distribute information promoting an after-school "Good News Club" run by the Child Evangelism Fellowship violated the Establishment Clause of the First Amendment of the U.S. Constitution. The Establishment Clause prohibits public bodies from taking any action, which has the effect of either endorsing or coercing participation in religious activities.

In the Maryland school district, elementary school teachers routinely distributed materials for numerous governmental and non-profit organizations, such as the 4-H Club and the Boy Scouts. The school district, however, denied the request of the Good News Club to distribute information and permission slips to students on the basis that involving public school teachers in the distribution of overtly religious materials would imply government endorsement of religion in violation of the Establishment Clause.

In Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Cty. Pub. Schools, the Fourth Circuit determined that the school district could not demonstrate a compelling governmental interest, based on Establishment Clause concerns, to justify its policy against distributing religious materials while allowing distribution of non-religious materials. The Fourth Circuit also determined that the distribution of the Good News Club materials during non-instructional times would not create a perception of endorsement or coercion by government officials. Further, it specifically determined that the school district could not refuse to allow the Good News Club to distribute its flyers simply because they were religious in nature.

Based on this decision, a school district is not required to distribute religious flyers or other materials. If, however, a school district permits some organizations, such as Boy Scouts, Girl Scouts, little league organizations, or other community organizations to distribute materials, it may be required to permit religious organizations to distribute information as well. In other words, once a school district decides to permit the distribution of materials by non-school groups, it generally may not differentiate between outside organizations on the basis of the content of their materials.

In light of the unclear and ever-changing nature of religious issues in public schools, the decision of whether to allow outside groups to distribute materials in the schools must be made on a case-by-case basis, based on the totality of the circumstances and the best needs of the district.

Pledge Of Allegiance In Schools Upheld By U.S. Supreme Court

In June 2004, the United States Supreme Court overturned a decision by the Ninth Circuit Court of Appeals, which had previously ruled that a school board policy mandating teachers to begin each school day by requiring students to recite the Pledge of Allegiance is unconstitutional. Although the Supreme Court did not specifically rule that such a policy is constitutional, its decision has the effect of permitting the Pledge of Allegiance to be recited by school children.

In this case, the Supreme Court overturned the lower court on a technical matter related to the plaintiff's custody of his daughter. In this case, Elks Grove United School District v. Newdow, the self-professed atheist father of the student filed suit on behalf of his daughter challenging a school board policy, which required teachers to begin each school day by having students recite the Pledge of Allegiance. Neither the mother nor the child objected to the recitation of the Pledge of Allegiance. Because the father is the non-custodial parent of the student, the Court ruled that he did not possess sufficient legal "standing" to challenge the constitutionality of the words "under God" in the Pledge of Allegiance on behalf of his daughter.

As a result of the Supreme Court's decision, schools may continue their daily recitations of the Pledge of Allegiance. The decision, however, does leave open the possibility that another parent, who possesses proper legal standing, may challenge the constitutionality of the Pledge of Allegiance. To date, no such challenge has been filed with the United States Supreme Court.

"Faith Based Organizations" And Federal Grant Programs

On June 4, 2004, the United States Department of Education (DOE) issued final regulations concerning the ability of religiously-affiliated organizations, called "Faith Based Organizations" (FBO), to compete for opportunities to participate in federally-funded programs as a grantee, subgrantee, or contractor to a grantee or subgrantee. The new regulations are amendments to existing DOE rules on federal grants accounting and administration. The following summary addresses only the obligations of a

local school district as a grantee or subgrantee, when it is contracting with an FBO to carry out a program supported by a grant; however, the basic rules for FBO practices and limits are the same regardless of the method by which the federal grant funds come to the FBO.

The new rules clearly state that an FBO is eligible to contract with a school district on the same basis as any other private organization under federally-funded programs. In fact, in the selection of goods and services providers under federal grants, a school district cannot discriminate for, or against, a private organization on the basis of the organization's religious character or affiliation.

Under the rules, if an FBO receives federal grant, subgrant, or grantee-contract funds, the FBO cannot use the funds to pay for religious worship, instruction, or proselytization, nor may it use the funds to purchase equipment or supplies to be used for such activities. The rules also provide that a private organization, which engages in inherently religious activities such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a school district, and participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary. Both of the foregoing provisions contain an exception for situations where the FBO receiving the funds "is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program."

Under the new regulation, the FBO may retain independence, autonomy, right of expression, religious character, and authority over its governance. The FBO may not, however, discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief. Finally, a religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion is not forfeited when the organization contracts with a grantee or subgrantee.

U.S. District Court Judge Dismisses Overtime Suits Against South Carolina School Districts

On April 14, 2004, U.S. District Court Judge Henry Floyd dismissed all cases that had been filed by the Mississippi-based School Litigation Group on behalf of classified employees of 25 different South Carolina school districts on the ground that the Eleventh Amendment to the U.S. Constitution bars individual employees from filing suits against South Carolina school districts under the Federal Fair Labor Standards Act (FLSA). In his decision, Judge Floyd ruled that because South Carolina school districts are so closely regulated by South Carolina law and State Department of Education regulations, they are "arms of the State," and as such, they share the State's immunity from private FLSA suits. At the time of Judge Floyd's decision, none of the districts sued in other states – including Mississippi, Alabama, Georgia, or Arkansas – had moved to dismiss or otherwise sought a ruling on the Eleventh Amendment defense.

The School Litigation Group did not appeal any of the dismissals. Thus, Judge Floyd's decision, combined with the failure to file an appeal, should effectively prevent any South Carolina school district employee from filing a private lawsuit in federal court seeking unpaid overtime wages under the Fair Labor Standards Act (FLSA). The decision may also permit districts to raise the Eleventh Amendment to defeat other types of future lawsuits.

The attorneys who filed the cases on behalf of classified employees in South Carolina claim to have recovered almost $30 million for classified employees in Mississippi alone. Given most South Carolina districts' limited financial resources, the potential financial impact on public education in South Carolina could have been devastating had these suits been allowed to go forward.

Districts should understand, however, that the ruling does not mean that they are no longer covered by the FLSA. Although employees cannot bring private suits, the United States Department of Labor still has jurisdiction to investigate unpaid overtime compensation claims against school districts and enforce the FLSA through legal action. If the Department of Labor concludes, after investigation, that a district has violated the FLSA, an aggrieved employee normally would be allowed to recover his or her actual unpaid wages going back two years. Employees would not, though, be able to recover any of the liquidated damages, interest, and attorney's fees that would be recoverable in a private lawsuit and which drove school districts in other states to settle the suits the School Litigation Group filed against them.

The Department of Labor does not appear inclined to pursue any type of systemic investigation of school pay practices in South Carolina, and employee complaints to the Department of Labor have been very isolated. Nevertheless, school districts should continue to examine their pay practices for FLSA compliance and promptly correct any errors.

U.S. Department Of Labor Clarifies Volunteer Rules For Classified Employees

Since the Mississippi-based School Litigation Group began pursuing collective-action overtime lawsuits against school districts in the Southeast two years ago, many school districts have asked local offices of the U.S. Department of Labor (DOL) to conduct audits and provide assistance in complying with the Fair Labor Standards Act (FLSA). Local DOL offices have given school districts inconsistent advice regarding whether school district employees can properly "volunteer" for school-related activities. This inconsistent and often incorrect advice has caused many districts significant administrative problems with after-school activities and resulted in substantial overpayments to classified employees, particularly employees with coaching and assistant coaching duties. In a recent opinion letter to Congressman Cass Ballenger of North Carolina, the DOL has attempted to clarify how the FLSA rules apply to school employees who donate their time for coaching duties, field trips, booster clubs, tutoring, and other after-school activities.

To qualify as volunteer service exempt from the FLSA: (1) participation in an activity must be the employee's own free choice, without direct or implied coercion from the employer; (2) the duties performed as a volunteer must be different from the duties of the employee's regular job; and (3) the employee must either receive no compensation for the volunteer service or "nominal compensation" such as reimbursement for expenses, reasonable benefits, or other insignificant sums not designed to substitute for compensation.

In the letter to Congressman Ballenger, the DOL indicated it would not pursue overtime or minimum wage claims on behalf of non-exempt employees who volunteer for certain after school services. For example:

- The DOL removed two stumbling blocks to treating classified employees who serve as coaches or assistant coaches as volunteers by (1) confirming that coaching involves duties different enough from teaching assistant duties to justify volunteer treatment and (2) confirming that volunteer duties do not have to be "occasional and sporadic" to qualify for the exemption, as many local DOL offices had insisted.

- The DOL will not assert FLSA violations when a volunteer is a parent and is donating his or her time in that capacity. For example, a bus driver may volunteer to drive the basketball team to away games if his child is a team member.

Unfortunately, the DOL did not attempt to define "nominal compensation" for the purposes of the exemption, and it remains unsettled whether stipends or other fees commonly paid for assistant coaching duties can be considered "nominal" compensation under the FLSA rules.

Although this new guidance is potentially very helpful to school districts, which permit non-exempt employees to volunteer as coaches and club sponsors, districts must still be prepared to establish that their employees' services are truly voluntary and not coerced or implied. In addition, school districts should not assume that stipends paid for coaching and other volunteer duties are sufficiently "nominal" compensation in compliance with the FLSA volunteer rules. Accordingly, districts should review their practices with regard to assistant coaches and other traditional "volunteer" positions and implement controls to make sure they can continue to receive favorable treatment under this new guidance.

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