

# Chalkboard

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Volume 16  
 Issue 2

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## SCHOOL BOARD INVOCATIONS

### Supreme Court Decisions

The Supreme Court of the United States has yet to decide whether invocations at school board meetings would violate the Federal Constitution. Consequently, lower federal courts have had to make the determination regarding the constitutionality of school board prayers by applying opinions of the Supreme Court in other Establishment Clause settings. As the lower courts have investigated the issue, they have used the following two decisions by the Supreme Court to decide the controversy.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court determined that the practice of opening a state legislative session with a prayer did not violate the U.S. Constitution. The rationale supporting this decision focused mainly on the nation's history and tradition—legislatures and other

deliberative bodies have used an invocation to start sessions since the founding of the republic; therefore, an invocation under these circumstances was "simply a tolerable acknowledgment of beliefs widely held among the people of this country." Lower courts view the holding in *Marsh* as narrow, that is, only applicable to legislatures and other deliberative bodies.

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court ruled that prayer, even a nonsectarian prayer, at school graduation ceremonies was unconstitutional. Decided after *Marsh*, the Supreme Court noted that differences between the public school system and a session of the state legislature required the court to reject *Marsh* as applying in the high school graduation context. Essentially, the

Court based its decision on a matter of coercion because a graduation ceremony is "one of life's most significant occasions, and a student is not free to absent herself from the exercise in any real sense of the term 'voluntary.'"

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### Lower Federal Court Decisions

The issue for the lower courts to decide is whether the *Marsh* standard or the *Lee* standard will apply when judging the constitutionality of prayer at school board meetings. If the *Marsh* standard applies, the practice will more than likely be constitutional; if not, the court will use the rationale in *Lee* and apply the test announced by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which states that a government-sponsored activity will not violate the First Amendment if: (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement with religion. Not surprisingly, decisions that have come down from the lower courts have landed on both sides of the issue.

In *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192 (C.D. Cal. 1998), a District Court in California held that a school board meeting was similar to a state legislature in that it was a “deliberative body.” The court recognized that although “a school board meeting does conduct the business of the public schools, a school board meeting does not cause the heightened concerns regarding children found in school related contexts.” This view was taken because those in attendance at school board meetings were almost exclusively adults, and all of them appeared voluntarily. Additionally, anyone could arrive to the meeting late and forego the prayer altogether. Therefore, according to this court, the fact that the school board chose the individual who was to give the prayer at random and the fact that there was no evidence of attempting to promote a Christian or any other religion led to the conclusion that the practice of giving an invocation prior to a school board meeting was constitutional. The case went on appeal to the U.S. Court of Appeals for the

Ninth Circuit, and the Ninth Circuit, in an unpublished opinion, overturned the District Court’s decision; however, the Ninth Circuit failed to address whether *Marsh* applied, rather it based the reversal on the fact that references to “Christ” and “Jesus” demonstrated preference for one religion over another. The prayer in *Marsh* happened to have no reference to Christ, although the holding of the case did not rest on this fact. The Ninth Circuit’s decision rested on the proposition that prayers beginning school board meetings should be nonsectarian, and the particular facts of the case warranted overturning it. See *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002).

#### DID YOU KNOW?

**The Internal Revenue Service and Treasury Department announced September 9, 2005 an increase to the optional standard mileage rates for the final four months of 2005.**

**The rate will increase to 48.5 cents a mile for all business miles driven between Sept. 1 and Dec. 31, 2005. This is an increase of 8 cents from the 40.5 cent rate in effect for the first eight months of 2005, as set forth in Rev. Proc. 2004-64.**

On the other hand, other courts have arrived at a different conclusion. In *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), the U.S. Court of Appeals for the Sixth Circuit

held that prayer in school board meetings should be governed by the decision in *Lee* because the meetings were intimately tied to the functioning of the school district itself, including decisions made regarding “curriculum, dress code, searches of student lockers, disciplinary rules, expulsion and suspension procedures, and the promotion of ‘ethical principles and democratic ideals’ in students.” Additionally, the school board included a student representative, and other students often attended and participated. Thus, the Sixth Circuit concluded under these facts that opening school board meetings with a prayer was unconstitutional because it failed the *Lemon* test.

More recently, in *Doe v. Tangipahoa Parish Sch. Bd.*, 2005 WL 517341 (E.D. La. Feb. 24, 2005), a Louisiana District Court agreed that opening school board meetings with sectarian prayer violated the

constitution. The court could not overlook the inherent differences between a public school system and a state legislature; therefore, the court did not apply *Marsh* even though it agreed that the school board was a “deliberative body.” Although it was a “deliberative body,” the court found that a school board was an integral part of the public school system. Applying the factors from the *Lemon* test, the court found the saying of a prayer to initiate a school board meeting was unconstitutional, especially when the prayer being offered was a sectarian one.

### *Avoiding Litigation*

The state of Oklahoma is within the U.S. Court of Appeals for the Tenth Circuit, and no court within the Tenth Circuit has specifically decided the constitutionality of saying a prayer at a school board meeting. This leaves the issue unresolved for school districts within Oklahoma. Obviously, the easiest way to prevent litigation would be to have a policy within the school district prohibiting invocations at school board meetings.

If a school board allows an invocation, the school board *at the very least* should adhere to the following criteria: (1) require that prayers be nonsectarian (not favoring or promoting any particular faith); (2) make it an open forum where individuals may choose to not say a prayer, but rather solemnize the occasion with an inspirational message; and (3) allow members of *all* faiths to participate.

A nice middle-ground may even be allowing a moment of silence so members of the board and those in the audience may use that time in their own way.

### *References in Addition to Cases Cited Above:*

*Court Orders Halt to Religious Invocations at School Board Meetings*, LEGAL NOTES FOR EDUCATION, Mar. 2003 at 8.

*Invocations can open door to fierce debate*, YOUR SCHOOL AND THE LAW, Vol. 34, Iss. 12 at 5.

*School Board Invocation Violates Establishment Clause*, LEGAL NOTES FOR EDUCATION, July, 1 2005 at 4.

*School board-sanctioned prayer could result in legal challenges*, YOUR SCHOOL AND THE LAW, Vol. 34, Iss. 12 at 1, 4.

### IS A POLICY NECESSARY - THE REQUIREMENTS OF TITLE 70

Administrators often wonder whether new legislation requires them to adopt certain policies. While some legislative changes make the decision obvious, oftentimes the answer is not as clear. This is the first of a multi-part article identifying areas requiring policy adoption.

- OKLA. STAT. tit. 70, § 1-111  
Internet courses

The State Board of Education has implemented rules to allow remote internet-based courses, and each district board of education must adopt policies and procedures that conform to the rules for the internet-based courses as adopted by the Oklahoma State Board of Education.

- OKLA. STAT. tit. 70, § 1-113  
Residency

Each school district board of education is required to adopt a policy establishing the requirements for student residency for that district which provides for residence as described in the statute.

- OKLA. STAT. tit. 70, § 1-116.3  
Asthma medication

The board of education of each school district must have a policy that allows for the self-administration of asthma inhalers.

- OKLA. STAT. tit. 70, § 5-117  
Board powers & duties

The board of education of each school district shall adopt and maintain on file in the office of the superintendent of schools appropriate personnel policy and sick leave guide. The guide shall be made available to the public.

- OKLA. STAT. tit. 70, § 5-142  
Employment of convicted felons

For districts with **30,000 students or less**, the board of education must promulgate a statement of the district's policy regarding felony record searches. The rest of the statute discusses the requirements of this policy.

- OKLA. STAT. tit. 70, § 5-142.1  
Employment of convicted felons

For districts with **30,000 students or more**, the board of education must promulgate a statement of the district's policy regarding felony record searches. The rest of the statute discusses the requirements of this policy.

- OKLA. STAT. tit. 70, § 5-146  
Reporting assault, battery, or both

Every school district shall have and deliver to each school employee a written policy that such employee shall follow if an assault, battery or assault and battery is committed upon the school employee while in the performance of any school duties.

- OKLA. STAT. tit. 70, § 5-189  
Duplicate checks

The board of each school district shall establish policies and procedures as will, as nearly as possible, preclude any loss being sustained by the school district on account of the issuance of any second or duplicate check or warrant.

## CPR TRAINING ACT (SB 618) EFFECTIVE JULY 1, 2005

### *Effect on School Districts*

**SB 618** requires that each school district board of education ensure that a minimum of one certified teacher and one noncertified staff member at each school site receives training in CPR and the Heimlich maneuver each year. In addition, the legislation permits students enrolled in physical education classes (grades 9-12) to receive instruction in CPR and the Heimlich maneuver to respond to cardiac arrest or choking, and permits the State Department of Education to administer CPR and Heimlich maneuver instruction programs and train teaching personnel pursuant to the rules adopted by the State Board of Education. The district may use funds provided for professional development to provide training in CPR and the Heimlich maneuver.

### *Liability*

There is no liability for district or individual employees for injury or death of a student, teacher, or other person resulting from CPR or choking incidents; however, the legislation provides that this does not absolve the district or a school employee of liability that might otherwise exist under the Governmental Tort Claims Act. In summary, the legislation requires that districts take steps to secure the required training for at least two individuals (one certified and one non-certified) at each school site. Where no certified person is assigned to a site, it is suggested that the district train an additional non-certified person to ensure two individuals are trained each year at each site.

## THE LIGHTER SIDE - A LOOK AT EDUCATION THEN AND NOW

### How things have changed ...

In February of 1910 the Oklahoma City School Board passed a resolution to remove females from principal positions above the elementary level because “masculine influence and brawn was needed” to control young toughs not complying with school rules. (Passage caused “great turmoil” at the meeting and a sharp rebuke from the Oklahoma City Federation of Women’s Clubs.)

### But how they haven’t ...

#### Whacky parents at ball games ...

On March 12, 1910, the girls’ basketball game between Shawnee High School and Central State Normal School had to be halted before the end of the game because a hostile crowd of parents interfered with the ability of officials to control the contest. The Edmond crowd displayed “bitter feelings” because of the “severe trouncing” the Shawnee girls had inflicted on the Edmond gals a few weeks earlier.

#### Complaints about presentations to students ...

At a May 15, 1910 meeting of the Oklahoma County Teachers’ Association the state president of the Women’s Temperance Union addressed the educators and declared that singing patriotic songs suggesting war and fighting “had an undesirable effect on the minds of the young and should be eliminated from public school exercises and not taught to the coming generations of the American Nation.” In particular, she criticized morning exercises in which students sang “The Star-Spangled Banner,” “The Army and Navy Forever,” and “Tramp, Tramp The Boys Are Marching.”

#### Construction problems ...

A Murray County school district ordered

construction of a new school building to stop because of numerous defects and filed suit against the contractor and his surety, which had refused to honor its bond guaranteeing the contractor would build the structure in compliance with specifications. March 22, 1910.

## THE OKLAHOMA OPEN MEETING ACT (25 OKLA. STAT. § 302 ET SEQ.)

This is a continuation of the *Chalkboard’s* focus on the basic requirements of Oklahoma’s Open Meeting Act.

**Q:** Does Oklahoma’s Open Meeting Act apply to administrative meetings?

**A:** The law only governs meetings of “public bodies.” The public body of a school district is the Board of Education. *Staff* meetings need not comply with the law. However, the law would apply if a majority of school board members attend an administrative meeting and discuss district business with the administration.

**Q:** When do members of the board of education *participate* in a meeting and, by virtue of that, trigger application of the Open Meeting Law?

**A:** State law defines a “meeting” as “conducting business of a public body by a majority of its members being personally together.” Although the law specifically bars a majority of members from meeting informally to “decide any action or vote on any matter,” the definition of a meeting is not restricted to meetings where votes occur. Discussion of school district business by a majority of its members should be regarded as triggering the statute, and should be avoided, outside a meeting in compliance with the law. The Attorney General has held that the law applies when a majority of members meet to discuss appropriations or to receive insight from a group of experts or initially meet informally to discuss personal issues but move the discussion from non-district topics to a

discussion of district business matters. (AG Op. No. 82-212) or discusses the operation, improvement, or maintenance of public property (Op. No. 81-184). Accordingly, the law is applicable, even when no decisions are made, if the discussion of school business is the topic of conversation.

### RFR SPEAKERS' CALENDAR

- ...and the IEP team said, "Just Tell Us What to Do." Everything you Ever Wanted to Know About the New IDEA

September 23, 2005  
9:00 a.m. – 3:00 p.m.  
Oklahoma City Crowne Plaza Hotel  
Andrea R. Kunkel (with Laura Bixler, Ph.D., sponsored by Wingspan, Inc.)

- Rosenstein, Fist & Ringold Annual Fall School Law Update and Golf Tournament

Date: Wednesday, October 5  
Time: 9:00 a.m. to 5:00 p.m.  
Location: White Hawk Golf Club, Bixby, Oklahoma  
Cost: \$50  
Speaker Names: John G. Moyer, Jr., John E. Howland, Jerry L. Zimmerman and Bryan K. Drummond

- OSSBA Special Education Law Workshop

October 11, 2005  
Oklahoma City Crowne Plaza Hotel

Andrea R. Kunkel is a presenter at the workshop and will discuss what happens in a due process hearing, disciplining children with special needs, and dangerous students and appropriate placement.

- Section 504 vs. the IDEA in Oklahoma

November 18, 2005  
9:00 a.m. – 4:30 p.m.  
Oklahoma City Crowne Plaza Hotel  
John E. Howland & Mark S. Rains (to be joined by other speakers, sponsored by Lorman)

- ORUEF Administrators' National Seminar

February 2-4, 2006  
San Antonio, Texas  
Karen L. Long

### Publications:

- The Student Speech We Love to Hate: Constitutional Implications of Student Speech

Published in the August 13, 2005 (Vol, 76, No. 22)  
Oklahoma Bar Journal  
Karen L. Long and Jerry A. Richardson

Now Available:

- Larry Lewis' publication Oklahoma School Finance Guide titled *For the Depressed, The Despondent, The Despised and Those Identified with SFD (School Finance Disabilities)*, is available for purchase for \$25 by contacting the Oklahoma City or Tulsa Rosenstein, Fist & Ringold offices.

*Chalkboard* is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

*Chalkboard* is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.