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# California Three Rs

## Rights, Responsibility, and Respect

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## Student Expression at Graduation What's a Principal to Do?

by

Margaret Hill, Ph.D., California Three Rs Project Lead

High school administrators across California are planning graduation ceremonies and facing the perennial questions and challenges regarding the parameters for student expression at such events. The hot button issue around the nation is the controversy over prayer at graduation ceremonies. Charles Haynes, First Amendment Center Senior Scholar, wrote extensively about the issue in 2003 and most of the guidelines he discussed at that time are still valuable for schools to consider. It is important to remember that the following does not constitute legal advice, but rather it is a scholarly review of court decisions. School officials should consult with their school board attorney if they need legal help in sorting out this area of the law.

### School Sponsored Prayer

School officials were hoping that the fight over prayer at commencement was finally settled in 1992 when in *Lee v. Weisman* the Supreme Court declared that school-sponsored prayers at graduation were unconstitutional. This case clearly stated that the establishment clause of the First Amendment prohibits school officials from promoting or leading students in prayer. Though this ended the practice of inviting local clergy to offer prayers, it did not settle the issue of student religious expression.

Since free exercise and free speech clauses of the First Amendment protects student rights to engage in religious speech, some have argued that student-initiated, student-led prayers aren't government-sponsored, but legally protected free speech and free exercise of religion. Others counter that argument with the perspective that graduation is a school-sponsored event and that student speakers selected by school officials to offer prayers still send a message of school endorsement to a captive audience. This position was supported by *Santa Fe Independent School District v. Doe* (2000) when the Supreme Court decision struck down student-led prayers over the public-address system at high school football games. The court ruled that even though most students at the school supported and voted for the prayer activity, constitutional rights could not be limited by majority vote. The court also said that a prayer led by students rather than an adult did not make it legal since the event was school sponsored and the school retained control over the location, schedule, and content of the program.

### U.S. Department of Education Guidelines

To further complicate the issue, guidelines issued by the U.S. Department of Education in February of 2003 stated that prayer at graduation may be legal, but only under very specific conditions. The DOE guidelines clearly state that school officials "may not mandate or organize prayer at graduation or select speakers for such events in a

manner that favors religious speech such as prayer.” However, if a student speaker is selected on the basis of “genuinely neutral, evenhanded criteria,” and if the student retains “primary control” over the content of the speech, then the speaker is free to include religious or anti-religious expression. The DOE cautions schools to include a “disclaimer” in the graduation program that the speech is the speaker’s and not the school’s speech.

Taking this approach means creating what might be called a free-speech forum at graduation, during which time students are free to express themselves religiously or otherwise. This takes school officials out of the picture, giving them no power to review student speeches for religious or anti-religious content. This means students are free to say almost anything and, as many educational leaders have experienced, the results may be disastrous. Even though students may be restricted from speech that is sexually explicit, disruptive, or profane (*F.S. v Bethlehem Area School District*; *Bethel v Fraser*), students in this open speech forum setting could include criticism of the school, and or religious or political views that would be offensive to many. When school officials have tried to deal with problems caused by this by arguing that they could discipline students for offensive expression, they have consistently failed. For example, in 2004 school officials in New York denied a diploma to Tiffany Schley when her Valedictorian speech negatively criticized her Brooklyn high school, only to have the decision reversed. That same year, school officials in Grand Rapids cut off the microphone when the senior class president referred to his high school as a prison, creating such an incident that people will remember the school action much longer than that of the student.

### **Ninth Circuit Court of Appeals**

Even with its problems, some schools have chosen this approach. They need to be aware, however, that not everyone agrees with the U.S. Department of Education on what is and isn’t permitted under current law. The 2001 *Adler v Duval* case decided by the 11th U.S. Circuit Court of Appeals (covering Florida, Georgia and Alabama) appears to support the DOE advice, but some legal experts argue that the law remains murky in much of the nation, including California. The 9th Circuit appeared to take a different approach in 2000 in *Cole v Oroville Union High School District*, ruling that graduation is not an open speech forum but a government ceremony. As such, schools have a responsibility to avoid First Amendment establishment of religion violations. The Supreme Court has not decided this issue but California school leaders need to look to 9<sup>th</sup> Circuit Court of Appeals rulings for guidance.

Is there a better approach for school districts and community advisors to pursue? The California Three Rs Project suggests two.

### **Baccalaureate Programs**

Prayers and sermons that are held during the graduation weekend are best conducted at privately sponsored, voluntarily attended baccalaureate services held after school hours, perhaps at a local place of worship. In this setting, students and their families are free to pray as much as they wish, and in any way they choose. The school may announce the baccalaureate and even allow it to be held on campus if other community groups are given similar privileges. Moving prayers to baccalaureates won’t satisfy everyone, but it’s a good way to allow for an authentic religious practice at graduation time without violating anyone’s freedom of conscience.

### **Moments of Silence**

Starting commencement with a moment of silence solemnizes the occasion and provides the graduates and their parents an opportunity to pray, meditate or reflect according to the dictates of their individual consciences. However, this is appropriate only if the moment of silence is genuinely neutral. A neutral moment of silence that does not encourage prayer over any other quiet, contemplative activity will not be struck down, even though some students may choose to use the time for prayer.

If a moment of silence is used to promote prayer, chances are high that school officials would lose a challenge. In *Wallace v. Jaffree* the Supreme Court struck down an Alabama “moment of silence” law because it was

enacted for the express purpose of promoting prayer in public schools. When it issued the ruling, however, the Court indicated that a moment of silence would be constitutional if implemented in a genuinely neutral manner. Many states and local school districts currently have moment-of-silence policies in place. (First Amendment in Schools, p.44)

### Conclusion

The law related to the First Amendment and graduation is evolving and in some cases contradictory. To make this occasion the milestone for students that it is intended to be, one of the most important things to do is involve students, community, and parents who are planning the event in a review of the Three R's Principles.

**Rights** - religious liberty, or freedom of conscience, is a basic and inalienable right founded on the inviolable dignity of each person.

**Responsibilities** - freedom of conscience is not only a universal right, but it depends upon a universal responsibility to respect that right for others.

**Respect** - debate and disagreement are natural elements of democracy. Yet, if we are to live with our differences, not only *what* we debate, but *how* we debate is critical. A strong democracy and strong schools rest on a commitment by people of differing convictions to treat one another with civility.

By sharing these principles and legal concerns surrounding graduation ceremonies, students, parents, and the community will more likely be able to find "common ground" on the issue of student expression and graduation.

#### Sources:

Haynes, Charles, Sam Chaltain, John Ferguson, David Hudson, and Oliver Thomas. First Amendment in Schools. ASCD, 2003.

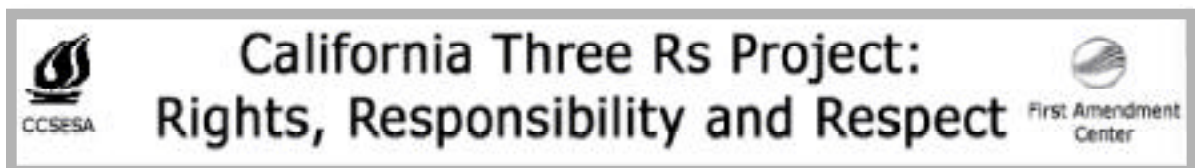
Haynes, Charles. Commentary "Graduation prayer a tricky issue, but consider this approach: Inside the First Amendment." May 25, 2003.

*"Michigan school officials pull plug on graduation speech," AP. May 21, 2004.*

*"Valedictorian to receive diploma denied after speech," AP June 29, 2004*

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For copies of previous California Three Rs Project Bulletins or more information about religious liberty issues and public schools access the CA Three Rs website.



[http://score.rims.k12.ca.us/score\\_lessons/3rs/](http://score.rims.k12.ca.us/score_lessons/3rs/)

**Common Ground Resources:**

*Finding Common Ground: A Guide to Religious Liberty in Public Schools* by Charles C. Haynes and Oliver Thomas. First Amendment Center, 2001.

This book has guidelines on how to handle a wide range of issues related to religious liberty and public schools.

**First Amendment Center: Religious Liberty** [http://www.firstamendmentcenter.org/rel\\_liberty/index.aspx](http://www.firstamendmentcenter.org/rel_liberty/index.aspx)

This is an up-to-the-minute resource with current issues and court cases. A PDF version of *Finding Common Ground* is available here.

**For California Three Rs program information, contact...**

Dr. Margaret Hill, California 3Rs Project Lead, San Bernardino County Superintendent of Schools, 601 N. E St., San Bernardino, CA 92410, (909) 386-2611, [peg\\_hill@sbcss.k12.ca.us](mailto:peg_hill@sbcss.k12.ca.us)

**For First Amendment religious liberty information, contact...**

Charles C. Haynes, First Amendment Center Senior Scholar, First Amendment Center/Arlington 1101 Wilson Blvd., Arlington, VA 22209 Tel: 703/528-0800 Fax: 703/284-3519  
[chaynes@freedomforum.org](mailto:chaynes@freedomforum.org)

**For information on teaching about world religions, contact...**

Dr. Bruce Grelle, Director, Religion and Public Education Resource Center, Department of Religious Studies, California State University Chico, Chico, CA 95929-0740, (530) 898-4739,  
[bgrelle@csuchico.edu](mailto:bgrelle@csuchico.edu)