

The Kennedy v. Bremerton School District Decision

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The U.S. Supreme Court's recent decision in *Kennedy v. Bremerton School District*—the widely-followed case addressing the right of a public high school football coach to individually pray on the fifty-yard line after a game—further clarifies the legal landscape of the First Amendment's application to public schools (this landscape was covered in-depth in our #TakeAKnee Legal Update). The First Amendment requires all public entities, including a public school, to balance its obligations under the Establishment Clause with the rights of staff under the Free Speech and Free Exercise Clauses. A full discussion of the Court's opinion is beyond the scope of this legal update, but school officials should review the following lessons from *Kennedy*.

Lesson One: How a school district portrays a staff member's conduct in the disciplinary communication matters.

Kennedy had a longstanding practice of engaging student athletes in motivational prayers before games as well as praying with students after games. Once the Bremerton School District found out, it asked Kennedy to stop. Initially, Kennedy complied, but then he decided to continue his practice of praying on the fifty-yard line after games, albeit without inviting students to join. The District then placed Kennedy on paid administrative leave, but cited only solo prayers as the reasons for Kennedy's eventual discharge. Consequently, the Court's analysis was narrow and focused on Kennedy's solo prayers. This approach from the Court implicitly suggests, if schools are to regulate a staff member's religious exercise, past conduct may not be relevant unless the school expressly identifies such conduct in the official reprimand to the staff member. Following *Kennedy*, requiring students to participate in prayers may still be disciplinary. School administrators should carefully and methodically document disciplinary actions against employees noting the specific reasons for that discipline. The adverse employment decision must align with the school's policies and procedures and should be supported by evidence of past behavior and incidents.

Lesson Two: School districts can no longer lean on the Establishment Clause to reprimand staff for engaging in public prayer.

The District's primary reason for suspending Kennedy from coaching was the concern that, by allowing Kennedy's public religious demonstrations to occur during or directly after school-sanctioned events, it would violate the Establishment Clause. Specifically, the District's response of stopping Kennedy's on field prayer was intended to communicate to observers it did not endorse Kennedy's religious conduct. This concept originates from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which created an "endorsement test" to offer guidance in enforcing the constitutional prohibition on state religious establishment.

In *Kennedy*, the Court dismissed the District's interpretation of the interplay between the Free Exercise and Establishment Clauses, concluding that the District created its own "self-imposed trap." The Court in *Kennedy* abandoned *Lemon* and the endorsement test, concluding there is not necessarily an Establishment Clause violation any time a school fails to censor private religious speech. Instead, the Court directed an evaluation rooted in the "historical practices and understandings" of the Establishment Clause. According to the Court, school districts may not prohibit an employee's private, non-coercive religious exercise in an effort to avoid offended responses or allegations of endorsement.

Following this decision, school districts must be attentive to the balance between protecting private religious liberty and preventing endorsement of one religion in public schools. The opinion does distinguish between unconstitutional religious activity in mandatory or official school events (*i.e.*, prayer at a graduation ceremony or over the speaker at a football game) and presumptively acceptable religious activity in voluntary public school programs (*i.e.*, "release time" programs for off-campus religious instruction during school hours upon parental consent). The Court notes that school employees may not coerce students to engage in religious practices. Based on the guidance the Court provided, it is recommended that school districts place a particular emphasis on whether an employee's conduct is coercive when determining if it may violate the Establishment Clause and, therefore, be subject to action (disciplinary or otherwise).

Lesson Three: School policies may not exclusively target religious exercise.

In *Kennedy*, the Court found that the District violated Kennedy's right to free exercise because the policy that restricted Kennedy's right to his solo, sincere religious practice was not neutral or generally applicable. According to the Court, the District violated Kennedy's constitutional interests by specifically restricting his religious exercise without addressing similar secular activity. Further, the policy was not evenly applied as the District did not penalize other coaching staff for engaging in personal, secular activities following the games (*i.e.*, visiting with friends or making a personal phone call). Going forward, school districts should review their employment policies to ensure all rules are neutral, generally applicable, and do not specifically target non-disruptive religious practice. School districts should also take steps so that the neutral policy is applied evenly by training administrators and educating staff on these policies.

Lesson Four: Not all speech by school employees is government speech.

In *Kennedy*, another key issue in the Free Speech analysis was whether Kennedy was speaking as a private citizen or as a government employee on behalf of the District when he prayed on the field following the football games. The Court reiterated that government speech occurs when public employees speak within the scope of their employment duties. The Court emphasized, however, that schools cannot rely on rigid written job descriptions or categorizations to determine when a school employee is acting or speaking within the scope of their employment. Rather, this may be a practical and fact-intensive question, as *Kennedy* illustrates. The scope of public employment is not suitable for mechanical or rigid categorizations but must be determined based on a functional and practical analysis that is not solely tied to written job descriptions. The Court concluded that Kennedy's speech was made as a "private" citizen because his prayers did not result from his responsibilities as a coach. In the Court's view, Kennedy prayed when other coaches engaged in personal matters and communicated as private citizens. Kennedy used this small break to engage in personal, barely audible religious speech not directed towards the players or spectators, thus he spoke in his capacity as a private citizen.

Following *Kennedy*, Districts should analyze whether an individual engaging in silent or solo religious practice is speaking as an employee or as a private citizen before taking action. As the Court made clear, an employee may take a brief detour from their job duties to pray and, in doing so, speak as a citizen under the facts presented, where the activity was solo, not coerced and not disruptive. Schools are advised to pay particular attention to the full spectrum of facts and circumstances surrounding an individual's speech when determining whether action is appropriate, including, but not limited to, the job description.

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