

SOUTH DAKOTA School Law Notes



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Q: Are email discussions between school board members “meetings” under the South Dakota Open Meetings Law?

A: **Maybe.** Courts in some states have held that contemporaneous email communications among a quorum of the governing members of a public body constitute a “meeting” of the public body when the members discuss the merits of pending issues. Email participation in scheduling or similar activity would not, under this analysis, constitute a public meeting. (See *Wood v. Battle Ground School District*, 27 P.3d 1208 (Wash. 2001).)

Q: In South Dakota, can a teacher serve as a school board member in the same school district?

A: **No.** No person employed to teach or to draw public money as a teacher may serve as a board member in the same school district.



Prayer and South Dakota Public School Board Meetings: Is There Any Change After The Greece Case?

Facts

The town of Greece, New York, is governed by a five-member town board that conducts official business at monthly public meetings. Starting in 1999, the town meetings began with a prayer given by an invited member of the local clergy. The town did not adopt any policy regarding who may lead the prayer or its content, but in practice, Christian clergy members delivered the vast majority of the prayers at the town's invitation. In 2007, Susan Galloway and Linda Stephens complained about the town's prayer practices, after which there was some increase in the denominations represented.

In February 2008, Galloway and Stephens sued the town and John Auberger, in his official capacity as Town Supervisor, and argued that the town's practices violated the Establishment Clause of the First Amendment by preferring Christianity over other faiths. The district court found in favor of the town and held that the plaintiffs failed to present credible evidence that there was intentional seclusion of non-Christian faiths. The U.S. Court of Appeals for the Second Circuit reversed and held that the practices violated the Establishment Clause by showing a clear preference for Christian prayers.

Question

Does the invocation of prayer at a legislative session violate the Establishment Clause of the First Amendment even in the absence of discrimination in the selection of prayer-givers and content?

Answer

No. Justice Anthony Kennedy delivered the opinion for the 5-4 majority. The U.S. Supreme Court held that the context and jurisprudence surrounding the First Amendment suggested that the Establishment Clause was never meant to prohibit legislative prayer, which created the proper deliberative mood and



acknowledged religion's role in society. The content of this prayer does not need to be non-sectarian, because such a requirement would place the courts in the role of arbiters of religious speech, which would involve the government in religion to an extent that is impermissible under the Establishment Clause. The Court thus held that the prayers in question do not violate this tradition and are therefore acceptable under the First Amendment. Justice Kennedy further argued that legislative prayer is primarily for the members of the legislative body, and therefore such prayers do not coerce the public into religious observance. Though the respondents testified that they felt offended by these prayers, Justice Kennedy distinguished between offense and coercion and noted that the former does not violate the Establishment Clause. Justice Antonin Scalia and Justice Clarence Thomas did not join in this portion of the opinion.

In his concurring opinion, Justice Samuel A. Alito, Jr. wrote that there is a long tradition of constitutionally permissible legislative prayer and that such prayer need not be non-sectarian, especially when such a requirement would place the government in the position of policing prayer. Justice Thomas wrote a separate opinion concurring in part and concurring in the judgment in which he argued that the Establishment Clause should be read as a federalist provision that protected states' rights rather than individual rights.

Justice Stephen G. Breyer wrote a dissent in which he argued that, as the Court of Appeals held, the Town of Greece must do more to make its legislative

prayer inclusive of other faiths. Despite the fact that the town is not exclusively Christian, the town made no significant effort to inform non-Christian clergy about the possibility of delivering an invocation, and in doing so, marginalized religious minority populations. Justice Elena Kagan wrote in a separate dissent that the town's failure to represent a variety of religions in its meetings amounted to the unconstitutional preference of one religion over others. To do so in a public forum where people come to participate in the political process forces individuals who do not agree with the beliefs represented in the prayer to either acquiesce or visibly make their dissent known. Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Breyer joined in the dissent.

Q: In South Dakota, can a public school district employee lose his job if he runs for public office?

A: No. Under South Dakota law, no employee of a public school can lose his job or job status for becoming a candidate for any public office if it does not entail neglect of duty.



Want To Run For Office?

Q: What is the process to non-renew a "probationary" teacher in South Dakota?

A: If a teacher is still on "probationary" status, a school board may or may not renew the teacher's contract. The superintendent or chief executive officer must simply give written notice of nonrenewal by April fifteenth. However, the superintendent or chief executive officer is not required to give further process or a reason for nonrenewal.



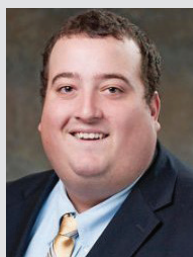
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