



June 12, 2012

Superintendent Isabel DiMola
CEC District 21



Re: Removal of “God Bless the USA” From P.S. 90 Graduation Ceremony

Dear Superintendent DiMola:

The American Center for Law and Justice (ACLJ) has learned that Principal Greta Hawkins of P.S. 90 has prohibited the school’s students from singing “God Bless the USA” by Lee Greenwood (also known as “Proud to be an American”) at the school’s upcoming kindergarten graduation ceremony because she did not want to “offend other cultures.” On behalf of the many concerned Americans, including New York City residents, who have expressed their strong disagreement with this decision to us in the past several days, we urge you to reverse this decision and allow the students to sing “God Bless the USA” at their graduation ceremony.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.¹ We have heard from thousands of citizens in New York and around the country who are outraged by Principal Hawkins’s decision.

¹ See, e.g., *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport’s ban on First Amendment activities).



STATEMENT OF FACTS

As we understand, kindergarten students at P.S. 90 have been rehearsing for their graduation ceremony, scheduled for June 20, for the past several months. Students have been practicing a couple of songs that they will sing at the ceremony, including “God Bless the USA” which has been performed at previous school events. For example, last year’s fifth grade class performed the song at their graduation and received a standing ovation. One teacher said that performance of the song often makes parents teary-eyed and she has never met anyone who was insulted or offended by the song.

Recently, when Principal Hawkins heard the students rehearsing “God Bless the USA,” she told the teachers overseeing the rehearsal to remove the song from the graduation program because it could “offend other cultures.” Since the song promotes patriotism, self-sacrifice, and freedom in a tactful manner—values broadly promoted in American schools since the country’s founding—it is unclear what cultures represented at P.S. 90 (if any) would actually find it offensive. Initially the song was going to be replaced by a Justin Bieber song about teen romance that is clearly inappropriate for five year olds, but that decision has recently been changed. As of now, it is unclear what song, if any, will replace “God Bless the USA” at the ceremony.

After learning of the Principal’s decision, Congressman Michael Grimm, whose district covers Staten Island and part of Brooklyn, stated:

I am outraged that NYC’s Department of Education is standing by the decision of PS 90’s principal to pull the song “Proud to be an American” from the upcoming kindergarten ceremony, for fear of offending other cultures. . . . It’s time we stop letting our political correctness destroy our values and American traditions, and start embracing the exceptional people and cultures that make our country great. God Bless America.

DISCUSSION OF LAW

For purposes of the First Amendment to the United States Constitution, student performances and speeches that occur at school-sponsored events—such as the students’ performance at the upcoming P.S. 90 graduation ceremony—often have elements of both school endorsement and student expression. As the following two sections explain: 1) to the extent that the student performance is viewed as the school’s own speech, the Establishment Clause does not require the school to remove “God Bless the USA” from the ceremony, and 2) to the extent that the performance is viewed as school-sponsored student expression, removal of the students’ preferred song due to its content and viewpoint is inconsistent with their free speech rights.

I. Allowing the Students to Sing “God Bless the USA” is Consistent With the Establishment Clause of the First Amendment.

Although the Principal’s stated reason for removing “God Bless the USA” was a concern about not offending other cultures, there may be an unstated concern that P.S. 90 would violate the “separation of church and state” (the Establishment Clause) by allowing a song that

references God to be included at the graduation ceremony. Such a concern would be unfounded, even if the songs performed at the ceremony were viewed as school-sponsored speech or government speech, because patriotic references to God—such as “God Bless the USA,” “God Bless America,” the phrase “one nation under God” in the Pledge of Allegiance, and the use of “In God We Trust” as the national motto and on currency—are fully consistent with the Constitution. Such expressions gained significant popularity among individuals of all religious faiths (or no faith) after the terrorist attacks of September 11, further underscoring their secular significance.

When the Supreme Court considered a challenge to the use of “one nation under God” in the Pledge, Justice O’Connor explained:

It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35-36 (2004) (O’Connor, J., concurring). She also stated:

[G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”). . . . These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

Id. at 37.

Similarly, a student performance of “God Bless the USA” at a graduation ceremony is no different than a teacher leading students in a voluntarily recitation of the Pledge of Allegiance. Both are secular activities permissible in public schools, and both serve the important purpose of furthering the principles of patriotism and self-sacrifice in a group setting.

II. To the Extent that the Student Graduation Performance Reflects Student Expression, the Students’ Freedom of Speech Rights Are Implicated.

Students retain their freedom of speech even when they participate in school-sponsored events like a graduation ceremony, or contribute articles to a school-sponsored newspaper, although schools have more discretion to restrict expression in these settings than they do when student expression occurs through student clothing or literature distribution. For example, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the Supreme Court recognized a school’s authority to prohibit vulgar student expression in a school-sponsored assembly, but the

Court did not declare that students have no speech rights whatsoever in such situations. Similarly, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court upheld a Principal's decision to remove student articles from a school-sponsored newspaper but emphasized that the decision was "reasonably related to legitimate pedagogical concerns." *Id.* at 273. In other words, where non-vulgar student speech occurs in a school-sponsored event, which is the case with the P.S. 90 graduation, a decision to censor that speech must be "reasonably related to legitimate pedagogical concerns." *See id.* It is doubtful that P.S. 90 can meet that standard in this case.

Censorship of "God Bless the USA" after the students rehearsed the song for months, based upon an unfounded fear that one individual (let alone an entire culture as the Principal suggested) might be offended, is not "reasonably related to legitimate pedagogical concerns." To the contrary, the song's message of self-sacrifice and patriotism furthers principles that are set forth in New York education law. For example, the state education code states:

It shall be the duty of the commissioner to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, and instruction in its correct use and display which shall include, as a minimum, specific instruction regarding respect for the flag of the United States of America, its display and use as provided by federal statute and regulation and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

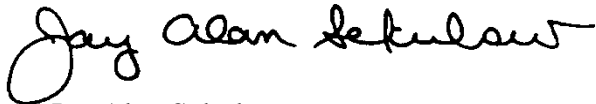
N.Y. C.L.S. Educ. § 802.1.

Another code provision requires the teaching of "courses of instruction in patriotism, citizenship, and human rights issues" "[i]n order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war." N.Y. C.L.S. Educ. § 801.1. The singing of "God Bless the USA" directly furthers these important pedagogical concerns, while removing the song undermines them. In addition, the fact that the song has been performed at previous school events with no sign of disruption or offense further undermines the Principal's decision. Reversing course and allowing the students to sing the song would promote the school's legitimate pedagogical interests while also respecting the students' freedom of speech.

CONCLUSION

We urge you to intervene in this situation and allow the students to sing “God Bless the USA” at their graduation ceremony. Public opinion, the First Amendment, and common sense all support this outcome.

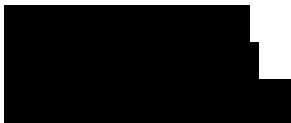
Sincerely,



Jay Alan Sekulow
Chief Counsel

cc: Mayor Michael R. Bloomberg
City Hall
New York, NY 10007

Chancellor Dennis Walcott



Principal Greta Hawkins

