

Supreme Court Rules Football Coach Can Pray on the Field after Football Games

The U.S. Supreme Court in a 6-3 decision held the District violated a coach's Free Exercise of Religion and Free Speech rights under the First Amendment when it prohibited him from praying at midfield at the conclusion of football games. Kennedy v. Bremerton School District, No. 21-418 (6/27/22).

Facts:

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. Coach Kennedy, like many other coaches and players across the country, made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. In his prayers, Coach Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." Coach Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds."

Initially, Coach Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Coach Kennedy responded by saying, "This is a free country. You can do what you want." The number of players who joined Coach Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join; other times Coach Kennedy still prayed alone. Eventually, Coach Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or

postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Coach Kennedy's tenure. Coach Kennedy explained that he "never told any student that it was important they participate in any religious activity." In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers.

For over seven years, no one complained to the Bremerton School District (District) about these practices. The District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal.

On September 17, the superintendent sent Coach Kennedy a letter identifying "two problematic practices" in which Coach Kennedy had engaged:

1. "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of . . . game[s]."
2. Kennedy had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program."

The District explained that it sought to establish "clear parameters...going forward" and instructed Coach Kennedy to avoid any

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motivational “talks with students” that “include[d] religious expression, including prayer,” and to avoid “suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]” any prayers of students, which students remained free to “engage in.” The District explained, an employee’s free exercise rights “must yield so far as necessary to avoid school endorsement of religious activities.”

After receiving the District’s September 17 letter, Coach Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. Coach Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. Driving home after a game, however, Coach Kennedy felt upset that he had “broken [his] commitment to God” by not offering his own prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks.

On October 14, through counsel, Coach Kennedy sent a letter to school officials informing them that, because of his “sincerely-held religious beliefs,” he felt “compelled” to offer a “post-game personal prayer” of thanks at midfield. He asked the District to allow him to continue that “private religious expression” alone. Consistent with the District’s policy, Coach Kennedy explained that he “neither requests, encourages, nor discourages students from participating in” these prayers. Coach Kennedy emphasized that he sought only the opportunity to “wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer.” He “told everybody” that it would be acceptable to him to pray “when the kids went away from [him].” He later clarified that this meant he was even willing to say his “prayer while the players were walking to the locker room” or “bus,” and then catch up with his team. However, Coach Kennedy objected to the logical implication of the District’s September 17 letter, which he understood as banning him “from bowing his head”

in the vicinity of students, and as requiring him to “flee the scene if students voluntarily [came] to the same area” where he was praying.

On October 16, shortly before the game that day, the District responded with another letter acknowledging that Coach Kennedy “ha[d] complied” with the “directives” in its September 17 letter, but it forbade Coach Kennedy from engaging in “any overt actions” that could “appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach.”

After receiving this letter, Coach Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, “most [Bremerton] players were . . . engaged in the traditional singing of the school fight song to the audience.” Though Coach Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer.

On October 23, shortly before that evening’s game, the District wrote Coach Kennedy again and made clear that the only option it would offer Coach Kennedy was to allow him to pray after a game in a “private location” behind closed doors and “not observable to students or the public.”

After the October 23 game ended, Coach Kennedy knelt at the 50-yard line, where “no one joined him,” and bowed his head for a “brief, quiet prayer.” After the final relevant football game on October 26, Coach Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. Later, Coach Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song.

Shortly after the October 26 game, the District placed Coach Kennedy on paid administrative leave and prohibited him from “participat[ing], in any capacity, in . . . football program activities.” In a letter explaining the reasons for this disciplinary action, the superintendent criticized Coach Kennedy for engaging in “public and demonstrative religious conduct while still on duty as an assistant coach” by offering a prayer following the games on October 16, 23, and 26. The letter did not allege that Coach Kennedy performed these prayers with students, and it acknowledged that his prayers took place

while students were engaged in unrelated postgame activities. Additionally, the letter faulted Coach Kennedy for not being willing to pray behind closed doors.

In an October 28 Q&A document provided to the public, the District admitted that it possessed “no evidence that students have been directly coerced to pray with Kennedy.” The Q&A also acknowledged that Coach Kennedy “ha[d] complied” with the District’s instruction to refrain from his “prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games.” But the Q&A asserted that the District could not allow Coach Kennedy to “engage in a public religious display.” Otherwise, the District would “violat[e] the . . . Establishment Clause” because “reasonable . . . students and attendees” might perceive the “district [as] endors[ing] . . . religion.”

While Coach Kennedy received “uniformly positive evaluations” every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. The evaluation advised against rehiring Coach Kennedy on the grounds that he “failed to follow district policy” regarding religious expression and “failed to supervise student-athletes after games.” Coach Kennedy did not return for the next season.

After these events, Coach Kennedy sued in federal court, alleging the District’s actions violated the First Amendment’s Free Speech and Free Exercise Clauses.

Coach Kennedy filed for a preliminary injunction in federal district court but did not prevail. At the Ninth Circuit Court of Appeals, a three-judge panel affirmed the federal district court. Coach Kennedy filed a petition for certiorari with the U.S. Supreme Court which was denied. On remand, the federal court ruled the District did not violate Coach Kennedy’s First Amendment free speech or religious rights. Again, the Ninth Circuit unanimously upheld the federal court ruling.

U.S. Supreme Court Ruling

In a 6-3 majority opinion the Court reversed the decision of the Ninth Circuit. According to the majority, the First Amendment’s Free Exercise and Free Speech clauses protect a “quiet prayer of thanks” at a time when “employees were free to speak.”

The majority of the Court determined that Coach Kennedy’s prayers did not amount to government speech that was attributable to Bremerton.

When [Kennedy] uttered the three prayers that resulted in his suspension, he was not engaged in speech ‘ordinarily within the scope’ of his duties as a coach. He did not speak pursuant to government policy and was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech [Bremerton] paid him to produce as a coach.

The Court explained “[t]hat [because] Coach Kennedy used available time to pray [it] does not transform his speech into government speech.” The Court briefly addressed the Lemon test and determined that “[i]n place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” The Court also concluded that Coach Kennedy did not engage in any coercion of students to participate in his prayers thereby rejecting the District’s argument that any visible religious conduct by a teacher or coach should be deemed coercive to students. Distinguishing prior precedential decisions prohibiting clergy-led prayer at graduation (Lee v. Weisman) and student-initiated and student-led prayer at football games (Santa Fe Independent SD v. Doe).

The Court commented: “The prayers for which [Kennedy] was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of [Kennedy’s] students did participate in any of the three October 2015 prayers that resulted in [Kennedy’s] discipline.”

Practice Note: Only time will tell what other types of cases will come to the forefront as a result of this decision. Districts, when faced with any potential free speech/free expression fact patterns, should immediately consult with their Solicitor or Special Counsel to navigate those legal waters.

Title IX Regulations 2.0

Less than two (2) years have passed since the release of expanded Title IX of the Education Amendments of 1972 (Title IX) regulations that placed a significant burden on school districts to revamp their policies and train various individuals on the requirements of the regulations and investigating complaints.

The United States Department of Education recently released in June 2022 proposed regulatory changes to Title IX. As you are aware, Title IX protects students, faculty, and staff from sex-based discrimination in the education programs and activities by institutions that receive federal funding. These Title IX regulations were last amended in May 2020 and, as most remember, faced immediate backlash along with many legal challenges.

These new proposed changes expand the scope of covered conduct; eliminate many of the detailed requirements for grievance procedures, including the controversial hearing and cross-examination requirements; make explicit protections for LGBTQI+ students; and add protections for pregnant students and employees.

It was also announced in the same press release that the Department of Education would also be engaging in separate rulemaking to address Title IX's application to athletics. This rulemaking would focus on whether and how the Department of Education should amend the Title IX regulations to address transgender students' eligibility to participate on a particular male or female athletics team.

The following are some of the most important highlights from the proposed new regulation that, if implemented, would impact institutions the greatest:

Expansion of the definition of “sex-based harassment”

Presently, “hostile environment” sexual harassment is defined as “unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.” The regulations recently proposed broaden the scope by defining the term as “unwelcome sex-based conduct that is sufficiently severe **or** pervasive, that, based on

the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”

This expanded definition would affect the application of the law in various ways. First, the new definition does not require a showing that the complained of conduct is severe, pervasive **and** objectively offensive. Rather, it requires severe **or** pervasive conduct. This change is more in line with Title VII employment discrimination cases.

Second, the new definition would cover conduct that **denies or limits** the ability to participate in or benefit from a program or activity instead of covering only conduct that rises to the level of effectively denying equal access.

Lastly, the new proposed regulation completely eliminated the “reasonable person” standard that had developed over a twenty (20) year period of federal district, appellate, and U.S. Supreme Court case law. That standard is instead replaced by a “totality of the circumstances” review which must be “evaluated subjectively and objectively.”

Expansion of groups entitled to protections

The proposed regulations significantly strengthen and expand the Title IX regulations for groups that were not explicitly covered by prohibiting discrimination on the basis of sexual orientation, gender identity, sex stereotypes, sex characteristics, and pregnancy or related conditions.

This change was brought about by and is supported by the Supreme Court’s decision of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which declared that it is “impossible to discriminate against a person” on the basis of sexual orientation or gender identity without “discrimination against that individual based on sex.”

Most notably, with respect to gender identity, the new regulations provide that students cannot be prevented from participating in programs consistent with the gender in which they identify. How this will apply to athletics is going to be determined by a separate rulemaking process.

Expansions of investigation, reporting and training requirements

Currently, schools are only required to respond promptly to only formal complaints. Under the proposed regulations, schools would be required

to respond to all complaints of sex discrimination. The regulations would also expand reporting and training requirements to a significantly broader base of employees. When these proposed regulations go into effect, they would expand a school's obligation to investigate other broad-based complaints as well. The regulations that were issued in August 2020 required extensive training of school district staff; it appears these new regulations will once again place an onus on school districts to train and offer further professional development for implementing the new regulation requirements.

Removal of requirement to conduct live hearing

The new regulations also propose that live hearings and cross-examinations be optional rather than mandatory. Schools would also be given the option under the proposed regulations to return to a single-investigator model in which a decision-maker assesses the credibility of the involved parties through live questioning.

The proposed changes will be subject to a sixty (60) day public comment period and may be revised further before being implemented. Stay tuned. More to come.

CONGRATULATIONS are in order for two of Beard Legal Group's partners who have been recognized in the May 2022 Pennsylvania & Delaware edition of SuperLawyer magazine.



Carl P. Beard has been recognized by his peers in Pennsylvania as a SuperLawyer. This selection is based off peer recognition and professional achievement in legal practice including education, labor/employment, and municipal law. Mr. Beard is managing partner of Beard Legal Group, P.C. For over 34 years Mr. Beard has been representing schools in special education, as Solicitor or Special Counsel. He is the recipient of the Tri State Area School Study Council's Distinguished Achievement in Law Award and Pennsylvania School Study Council's Award for Outstanding Service to Public Education. Mr. Beard frequently presents on behalf of the Pennsylvania School Boards Association and has presented at NSBA's Council of School Attorneys annual conferences.



Ronald N. Repak has been recognized by his peers as a Rising Star. Rising Stars is an exclusive list of top rated attorneys in specific practice areas who were chosen from numerous criteria. Mr. Repak's areas of practice are education law, labor/employment law, state and federal civil litigation, construction and municipal law. He represents employers as Solicitor and Special Counsel in arbitrations and other administrative proceedings before the PHRC and the PLRB. Mr. Repak has been a presenter to PSBA, PASPA the Principal's Association and others. In Governmental Affairs, Mr. Repak works for Legislative Policy Creation, Regulatory Advocacy Programs, and Economic Development on both the State and Federal Levels.

SAVE THE DATE

*Pennsylvania School Study Council
School Law Day September 13, 2022*

The Pennsylvania State University School Study Council will host its first all-day special education symposium.

Each year about 850 to 900 special education due process complaints are filed with the Office of Dispute Resolution.

While many of these cases get resolved through Mediation, Hearing Officer Settlement Conference or just being worked out between Districts and Parents (with or without attorney assistance), most cases being litigated can be placed into three (3) categories:

The three (3) most litigated areas encompass the following:

1. Challenges to School District Evaluations/Reevaluations and requests for Independent Educational Evaluations.
2. Child Find and Denial of FAPE.
3. Deficient IEPs to include inappropriate or non-measurable goals.

This symposium is intended to address those areas with a view of reducing litigation and cost exposure to Districts.

Target Audience: The presentation is intended for Superintendents, Principals, Directors of Special Education or anyone else tasked with overseeing and assisting in the delivery of special education services in Pennsylvania Schools.

Remember that no school district insurance carrier covers the cost of “compensatory education” and very few contribute toward parents’ attorney fees. With many parents’ counsel billing between \$350 to \$525 per hour, this symposium is a “must” for developing a proactive approach toward a District’s special education programming.

Location:

Central Intermediate Unit 10 Conference Center
60 Decibel Road, State College, PA

Virtual Option is also Available

This year’s topics will focus on Special Education issues in an effort to reduce litigation costs and the unnecessary expenditure of financial resources.

Topics and Speakers are:

Legally Compliant IEPs: Focusing on Behaviors | Dr. David Bateman, Special Education Consultant

Progress Reporting: Soup to Nuts [Legally Measurable and Defensible Goals] | Charles Jelley, Esquire, ODR Special Education Hearing Officer

School District and Special Education Curriculum to Enhance Student Performance | Sarah Schreiber, Supervisor of Special Education | Mollie Anzinger, Ed.D. Special Education Liaison

Special Education Case Law Update/Trends: What you Need to Know to Survive | Carl P. Beard, Esquire, Beard Legal Group, PC

Writing an Evaluation that Can Withstand Legal Challenge | Nicole Engleman, Ed.S., NCSP, Certified School Psychologist

Contact rfisher@beardlegallgroup.com to receive the link as soon as registration opens through the Pennsylvania School Study Council.

Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carriers.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Peggy Schooling mxs284@psu.edu.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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