June 18, 2019  
Board of Education  
Appleton Area School District  
122 E. College Avenue, Suite 1A  
Appleton, WI 54911

To the Appleton Area School District Board of Education:

We are aware of the recent controversy involving remarks made by Pastor Alvin Dupree at the 2019 graduation ceremony at Appleton North High School. Having reviewed the letters submitted to the Board by some who object to the religious language in Pastor Dupree’s speech and who are now demanding that the Board implement policy changes to restrict future speech, we are concerned that there is widespread misapprehension of relevant First Amendment law. This letter seeks to clarify a few important legal points so that the Board does not, in adopting any new measures, violate the free speech and free exercise rights of members of the school community. In that regard, we will be monitoring the Board’s next steps to ensure compliance with the federal and state constitutions.

Most fundamentally, it must be emphasized that freedom from religion is not a right guaranteed by the United States Constitution. The Supreme Court has warned that “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” Lee v. Weisman, 505 U.S. 577, 598 (1992). Indeed, the Court has “recognize[d] that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.” There is nothing inherently wrong with such interactions and the Court has declined to categorically condemn such eventualities, instead characterizing them as “often questions of accommodation of religion.” Id. at 598-99.

That public school students have some exposure to religious speech no more offends the Constitution, as a general matter, than the students’ exposure to secular speech. Recklessly blotting out only the former risks unconstitutional viewpoint discrimination. Cf., e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 839 (1995) (“More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.”). We view the objectors here as seeking to censor the First Amendment rights of religious believers, a position that, if agreed to by the Appleton School Board, would put the Board in violation of the federal constitution.
What the First Amendment forbids under controlling case law, and what therefore is a legitimate item of Board study in this matter, is state-sponsored or state-coerced religious activity. See, e.g., Lee, 505 U.S. at 587. But that is obviously not what happened here. Instead, a graduation speaker who is an elected official, whose very profession is religious ministry, and whose own daughter was among the graduates at Appleton North, made a handful of brief references to his own faith in the course of his commencement speech. That the speaker, Pastor Dupree, is a member of the Board of Education is of no moment where his remarks were not drafted, endorsed, or vetted by the Board and where Pastor Dupree’s statements made clear that he was speaking on his own behalf. See Doe ex rel. Doe v. Sch. Dist. of City of Norfolk, 340 F.3d 605 (8th Cir. 2003) (high school graduation speaker “introduced as a member of the School Board” was nevertheless engaged in protected private speech when he spontaneously delivered the Lord’s Prayer at graduation, such that no state sponsorship and thus no constitutional violation occurred).

Nor were Pastor Dupree’s remarks proselytizing in any way. For example, while explaining that his “source of strength” was his “faith and [his] relationship with Jesus Christ,” Pastor Dupree also counseled the graduates, “[W]hatever your source of strength is, you lean on it.” (Emphasis added.) A theme of Pastor Dupree’s speech was that the students should be themselves and not “conform to another man’s norm.” If Pastor Dupree was attempting to impose religious beliefs on the graduates, this was an odd way to do it.

Reference has been made by the objectors to a number of decisions of the Supreme Court, namely Lee v. Weisman, Santa Fe Independent School District v. Doe, and Wallace v. Jaffree, cases in which the Supreme Court concluded that certain religious activity permitted to occur in school settings violated the Establishment Clause. But these objectors exaggerate the relevance of those episodes to Pastor Dupree’s speech.

All three cases involved something that did not occur here: government-sponsored prayer. See Lee, 505 U.S. at 586 (“These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools.”); Santa Fe Independent School District v. Doe, 530 U.S. 290, 313 (2000) (“T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (“The legislature enacted [the statute] . . . for the sole purpose of expressing the State’s endorsement of prayer activities for one minute at the beginning of each school day.”)

Pastor Dupree’s speech was not government-sponsored prayer, not least because no invocation, benediction, or other spoken prayer in fact occurred while Pastor Dupree was at the podium. The objectors point to a part of Pastor Dupree’s speech when he offered a moment of silence for a would-be graduate who had committed suicide. Here is the entirety of his remarks, which preceded a three-second moment of silence:

One other voice that I’ll be a voice for: I was on Facebook and I saw [the] sister of [the deceased student], who would be a graduate. However, he’s not here. And I promised their parents that any opportunity I get I would always encourage the class no matter what oppositions come, that you can press, and you can make it. So just
an observation of [the deceased student] who would have graduated had not he succumbed to suicide. Can we just pause for a moment and just reflect on him as I pray for him to myself.

(Emphasis added.) That is, Pastor Dupree – who, again, is a religious minister – made a point of not only not praying aloud, but making clear that his brief, silent prayer was not on behalf of the school board nor on behalf of any other person in the room. No one was directed, asked, or even encouraged to pray. It was a moment to remember a member of the school community who had died through suicide. Such a moment was appropriate at the event and attempting to censor it is not only heartless but unconstitutional. This is not the type of action proscribed by cases like Lee, Santa Fe, and Jaffree.

The fact that some attendees may say that they were made uncomfortable by the words Pastor Dupree chose is of no constitutional import. The constitutional focus must be on the words he spoke. Graduation addresses feature a wide variety of speakers espousing a wide variety of views. That some might disagree with a speaker’s message is inevitable. The constitutional solution is to expand, not constrict, the amount and kinds of speech allowed. Consequently, this Board should not be bullied into adopting measures which sacrifice the First Amendment rights of members of the school community to please those who would turn any speech deemed offensive by some individuals in some way into a constitutional violation. See Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 589 (2014) (plurality opinion) (“Offense . . . does not equate to coercion”).

In addition to trampling rights, the Board would likely simply be providing a weapon with which the offended could challenge any future speeches that do not meet their subjective standards of permissibility. As stated above, we will be monitoring the Board’s next steps to make sure that the Board complies with the federal and state constitutions and does not interfere with the First Amendment rights of any part of the school community.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

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