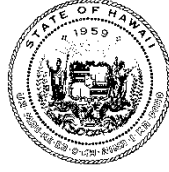


JOSH GREEN, M.D.
GOVERNOR



BRUCE D. VOSS
CHAIRPERSON

**STATE OF HAWAII
BOARD OF EDUCATION**
P.O. BOX 2360
HONOLULU, HAWAII 96804

February 16, 2023

TO: Board of Education

FROM: Bruce D. Voss
Chairperson, Board of Education

AGENDA ITEM: Board Action on amendment of Board Policy 900-3, entitled
"Religion and Public Schools"

I. EXECUTIVE SUMMARY

- The United States Supreme Court ruled on a landmark case, holding that the First Amendment protects an individual engaged in a brief, quiet, personal religious observance during a private moment.
- In light of this case, the Board of Education ("Board") should consider amending Board Policy 900-3, entitled "Religion and Public Schools."
- I recommend adopting the amended Board Policy 900-3 attached as **Exhibit C**.

II. BACKGROUND

On June 27, 2022, the United States Supreme Court ("Court") ruled on *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).¹ In *Kennedy*, Joseph Kennedy, a football coach employed by the Bremerton School District ("District"), led prayers with students on the field and in the locker room.² On September 17, 2015, the

¹ The opinion of the Court is available here: https://www.supremecourt.gov/opinions/21pdf/21-418_i425.pdf.

² *Kennedy v. Bremerton School District*, 142 S. Ct. at 2416.

District's superintendent sent Kennedy a letter that stated that any motivational talks to students must remain secular. The letter emphasized that student religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged, or supervised by any District staff.³ After the September letter, Kennedy stopped participating in locker room prayers.⁴

However, on October 14, 2015, Kennedy's lawyer sent a letter to the District announcing that Kennedy would resume his 50-yard-line prayer practice after the October 16th homecoming game.⁵ On October 16th, after the game had concluded, Kennedy knelt to pray on the 50-yard-line while most players were singing the school's fight song.⁶ He was joined by coaches and players from the opposing team.⁷ During the October 23rd and 26th games, Kennedy prayed again at the 50-yard-line immediately after the games.⁸ On October 23rd, the District sent Kennedy a letter explaining that he had the "responsibility for the supervision of players in the locker room following games."⁹ Additionally, the District noted that his behavior raised Establishment Clause concerns because he was "on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [his] prior public conduct, overtly religious conduct."¹⁰ Shortly after the October prayers, he was placed on paid administrative leave and was not rehired because he "failed to follow district policy."¹¹

After the 2015 events, Kennedy sued in federal court alleging that the District violated his First Amendment rights.¹² The district court found that Kennedy was suspended because of his perceived "risk of constitutional liability" under the Establishment Clause.¹³ The Ninth Circuit Court of Appeals affirmed the district court's decision.¹⁴

In *Kennedy*, the question before the Supreme Court was whether Kennedy offered his prayers in his capacity as a private citizen or whether his prayers amount to

³ See, e.g., *Id.* at 2516-2417 (citing App. at 44).

⁴ *Id.* at 2422.

⁵ *Id.* at 2417.

⁶ *Id.* at 2418.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2239 (citing App. at 92-93).

¹⁰ *Id.* (citing App. at 93).

¹¹ *Id.* at 2440 (citing App. at 114).

¹² *Id.* at 2419.

¹³ *Id.* at 2420.

¹⁴ *Id.*

speech attributable to the District.¹⁵ In the Court’s 6-3 decision, the Court found that during the three October prayers that resulted in his suspension, Kennedy was not engaged in speech “ordinarily within the scope” of his duties as a coach.¹⁶ The Court noted that his prayers occurred during the postgame period when “coaches were free to attend briefly to personal matters.”¹⁷ The Court found that Kennedy was allowed a private moment after the game to “call home, check a text, socialize, or engage in any manner of secular activities.”¹⁸ Kennedy’s choice to pray during his private moment did not transform it into government speech.¹⁹ Thus, the Court held that if an individual engages in a “brief, quiet, personal religious observance” during a private moment, it is protected by the Free Exercise and Free Speech Clauses of the First Amendment.²⁰

The Board has a policy covering religion and religious practices in public schools—Board Policy 900-3, entitled “Religion and Public Schools,” attached as **Exhibit A**. The Board last amended Board Policy 900-3 on June 21, 2016, when it renumbered the policy.

III. DISCUSSION

In light of *Kennedy*, the Board should consider clarifying amendments to Board Policy 900-3 to ensure that it complies with the facts and holdings of the case.

First, the Board should consider deleting the underscored clause in the third paragraph that reads, “Prayer and other religious observances shall not be organized or sponsored by schools and the administrative and support units of the public school system, especially where students are in attendance or can observe the activities.” The clause is unnecessary and could be misconstrued to conflict with the factual circumstances that occurred in *Kennedy*.

Second, the Board should consider adding a provision that states, “Department of Education employees may engage in brief, quiet, and personal religious observances when not engaged in the responsibilities of their job duties as long as their observances are not disruptive or coercive.” This provision aligns with the holding of the case and includes limiting language that is parallel for both students and employees.

¹⁵ *Id.* at 2424.

¹⁶ *Id.*

¹⁷ *Id.* at 2425.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 2433.

These proposed amendments are redlined into the existing policy in **Exhibit B**.

Note that, pursuant to Board Policy 400-3, entitled “Implementation of Board of Education Policy,” the Department of Education (“Department”) has up to 90 days from the date the Board adopts a new or amends an existing Board policy to submit an implementation plan to the appropriate Board committee.²¹ Because the proposed amendments primarily relate to the rights of employees, I will be referring the review of the Department’s implementation plan to the Human Resources Committee. Therefore, should the Board adopt the proposed amended policy, the Department has until May 24, 2023, to submit an implementation plan to the Human Resources Committee or seek an extension from the committee chairperson.

IV. RECOMMENDATION

Based on the forgoing, I recommend the Board adopt the amended Board Policy 900-3 attached as **Exhibit C**.

Proposed Motion: “Moved to adopt amended Board Policy 900-3, entitled “Religion and Public Schools,” attached as Exhibit C to Board Chairperson Bruce Voss’s memorandum dated February 16, 2023.”

²¹ See Board Policy 400-3 here: <https://boe.hawaii.gov/policies/Board%20Policies/Implementation%20of%20Board%20of%20Education.pdf>.

Exhibit A

**Board Policy 900-3, entitled "Religion and Public Schools," last amended on June
21, 2016**

POLICY 900-3

RELIGION AND PUBLIC SCHOOLS

Hawaii's public schools shall neither inculcate nor inhibit religion. Religion and religious convictions must be treated with fairness and respect. The First Amendment is upheld when the religious rights of students are protected, but religion is not promoted by public schools.

No religious instruction shall be given in any public school by any employee of the Department of Education during the regular school day. Teaching about religion shall be permitted where it is a natural part of the curriculum to study the history of religion, the role of religion in the history of the United States and other countries, and the religious influence on the art, music, literature, and social customs of various cultures. Discussion, examination, and reinforcement of values, ethics, and morals commonly shared in this pluralistic society shall be expected of every teacher when such opportunities arise.

Prayer and other religious observances shall not be organized or sponsored by schools and the administrative and support units of the public school system, especially where students are in attendance or can observe the activities.

Students may engage in voluntary, student-initiated religious activities and discussion as long as their behavior is neither disruptive nor coercive. Secondary students may meet in school during non-instructional time to pray, read religious materials, discuss their faith, and invite other students to join their religious group if the school establishes a limited open forum for one or more student-initiated groups.

[Approved: 05/19/2015 (as Board Policy 900.3); amended: 06/21/2016 (renumbered as Board Policy 900-3)]

Former policy 2230 history: former code no.: 6122.81; policy approved: 1947; amended: 07/1960, 11/1960, 05/1966, 10/1970, 03/1988, 01/1999

Exhibit B

Proposed amendments to Board Policy 900-3 (redlined version)

POLICY 900-3**RELIGION AND PUBLIC SCHOOLS**

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Department of Education employees may engage in brief, quiet, and personal religious observances when not engaged in the responsibilities of their job duties as long as their observances are not disruptive or coercive.

[Approved: 05/19/2015 (as Board Policy 900.3); amended: 06/21/2016 (renumbered as Board Policy 900-3), 02/16/2023]

Former policy 2230 history: former code no.: 6122.81; policy approved: 1947; amended: 07/1960, 11/1960, 05/1966, 10/1970, 03/1988, 01/1999

Exhibit C

Proposed amended Board Policy 900-3 (clean version)

POLICY 900-3**RELIGION AND PUBLIC SCHOOLS**

Hawaii's public schools shall neither inculcate nor inhibit religion. Religion and religious convictions must be treated with fairness and respect. The First Amendment is upheld when the religious rights of students are protected, but religion is not promoted by public schools.

No religious instruction shall be given in any public school by any employee of the Department of Education during the regular school day. Teaching about religion shall be permitted where it is a natural part of the curriculum to study the history of religion, the role of religion in the history of the United States and other countries, and the religious influence on the art, music, literature, and social customs of various cultures. Discussion, examination, and reinforcement of values, ethics, and morals commonly shared in this pluralistic society shall be expected of every teacher when such opportunities arise.

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