EDUCATION: POWERS AND DUTIES OF SCHOOL BOARDS.

As opposed to prayer conducted in public school context, opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in history and tradition of this country, does not present danger of establishing religion, and is therefore constitutional. Audience to which prayer is directed consists of adults who presumably are not susceptible to religious indoctrination or peer pressure. School board meeting is meeting of adults with official business and policymaking duties; does not warrant constitutional scrutiny that official public school function would warrant with regard to conducting prayer. Local school board may open meetings with prayer.

The Honorable Stephen D. Newman
Member, Senate of Virginia
March 13, 2000

You ask whether it is constitutional for the members of a local school board to pray at the start of their meetings. You relate that the school board has opened its meetings with a prayer since 1971 and that board members alternate in giving such prayer. You also relate that two student representatives attend such meetings. You further relate that other students may voluntarily attend such meetings, but their attendance is not required for class work or for disciplinary hearings conducted by the board. Finally, you relate that the board meetings are televised on the local cable television station.

The Establishment Clause of the First Amendment to the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, commands that a state "shall make no law respecting an establishment of religion." In analyzing the constitutionality of an invocation, the Supreme Court of the United States has recognized "heightened concerns" in applying the Establishment Clause in the public school context. In certain contexts, however, the Court has applied less rigorous standards to the reciting of an invocation. Most notably, in *Marsh v. Chambers*, the Court held that the Nebraska legislature’s practice of opening each legislative session with an invocation does not violate the Establishment Clause. It stated that opening a legislative session with prayer was rooted in historical practice, and did not present a real danger of establishing religion. The Court also noted in *Marsh* that the audience to which the prayer was directed is adults who presumably are not susceptible to religious indoctrination or peer pressure.

The Supreme Court notes in *Marsh* that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." Lower courts, both before and after *Marsh*, have held accordingly that a prayer recited at the beginning of meetings of various public bodies is constitutional. Thus, the issue presented by your inquiry is whether the invocation practice of a school board falls within the purview of the *Marsh* rationale as opposed to
prayer conducted in a public school context. It is my opinion, based on the limited facts presented, that the invocation practice to which you refer meets the *Marsh* analysis and is thus constitutional.

Like legislative prayer which is primarily directed to legislators themselves, the invocation in question is directed to the school board members. Additionally, the nature and function of the board meeting is a meeting of adults with official business and policymaking duties. The fact that two students voluntarily attend such meetings to provide input (along with any other students who may from time to time voluntarily attend such meetings) does not transform the board’s meetings from a policy and rule-making function into an official school function akin to a graduation ceremony or classroom instruction. It is thus my view that, like city councils and boards of supervisors, a school board is a deliberative public body charged with deciding business and policy issues. Consequently, it is also my view that the board’s meetings do not warrant the level of constitutional scrutiny required by the United States Supreme Court that an official public school function would warrant with regard to conducting prayer.

The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have yet to rule on this particular issue, and any such ruling is necessarily dependent upon the particular facts and circumstances. I am aware that the Sixth Circuit in *Coles v Cleveland Board of Education* held that the Cleveland school board’s practice of opening its meetings with a prayer is constitutionally prohibited. In so holding, the court disputed that *Marsh* is controlling and found that a school board meeting is so integral to the public school system to be tantamount to a public school function. For the reasons discussed above, I do not agree with the court’s holding, which, of course, is not controlling precedent in Virginia. It is my opinion that the prayer at issue is the prayer of a public deliberative body which occurs in a fundamentally adult atmosphere rather than in a student-oriented or school-oriented atmosphere. Accordingly, based on the facts presented, it is my opinion that if members of a local school board wish to do so, they may open their board meetings with a prayer.

1 I assume that the student representatives are not members of the school board appointed by city council and do not make any official decision. See Va. Code Ann. § 22.1-86.1(C). I further assume that, unlike their attendance at school, their attendance at school board meetings is not compulsory.

2 U.S. Const. amend. I; see id. amend. XIV, § 1.

3 See Lee v. Weisman, 505 U.S. 577, 592 (1992) (pervasive public school supervision of personal prayer at high school graduation is constitutionally prohibited).


5 *Id.* at 791-92.
6Id. at 792.

7Id. at 786 (emphasis added).


9Compare North Carolina Civil Liberties v. Constangy, 947 F.2d 1145, 1147-49 (4th Cir. 1991) (holding that Marsh analysis does not apply to judge’s courtroom prayer that is directed to litigants and their attorneys, rather than to fellow consenting judges, and is thus not analogous to legislative prayer that is primarily directed at legislators themselves).

10See § 22.1-79 (outlining powers and duties of school board).

11171 F.3d 369 (6th Cir. 1999).

12Id. at 381.