



## MEMORANDUM

**TO:** Board of School Directors

**FROM:** Marc B. Davis  
Michele J. Mintz

**DATE:** June 2, 2016

**RE:** Opinion Regarding Invocation and/or Benediction at Public School Graduation

### ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

We have been asked to issue an opinion as to whether a student providing a benediction and/or invocation at graduation is a violation of the Establishment Clause of the First Amendment. For the reasons set forth herein, it is our opinion that a student, or any other speaker, providing a benediction and or invocation at graduation is a violation of the Establishment Clause of the First Amendment, based on the facts set forth below.

### FACTS

Based upon information provided by the district, it is our understanding that the district does not have a board policy regarding a speaker providing a benediction and/or invocation at graduation. However, the district has had a long-standing tradition of allowing a student to provide a benediction and/or invocation at graduation. The student speaker is a selected by a panel of teachers at school.

### ANALYSIS

The Establishment Clause of the First Amendment prohibits Congress from making any law respecting an establishment of religion or prohibiting the free exercise of religion. The Establishment Clause is imposed upon states and political subdivisions of states through the Fourteenth Amendment. *Wallace v. Jaffree*, 472 U.S. 38 (1985). To determine whether a state or political subdivision's actions have violated the Establishment Clause, the United States Supreme Court established a three part test. First, to "satisfy" the Establishment Clause a "governmental<sup>1</sup> practice must "reflect a clearly secular purpose." Second, the governmental practice must "have a primary effect that neither advances nor inhibits religion." Finally, the governmental practice must "avoid excessive government entanglement

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<sup>1</sup> The term "governmental practice" or government includes actions and practices of states and political subdivisions, including school districts.

with religion.” See, *Lemon v. Kurtzman*, 402 US. 602 (1971). Even though the government “may accommodate the free exercise of religion” this principle “does not supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The United States Supreme Court has held that “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion, or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”*Id.* (Emphasis added)(internal citations omitted). Government speech endorsing religion is prohibited by the Establishment Clause. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990)(opinion of O’Connor, J.).

Both the United States Supreme Court and the Third Circuit Court of Appeals, which is the highest federal appellate court governing Pennsylvania, have addressed whether invocations and benedictions in graduation ceremonies in public schools violate the Establishment Clause of the First Amendment. Both the United States Supreme Court and the Third Circuit Court of Appeals have held that invocations and benedictions authorized by a government policy, that take place on government property and at government sponsored school related events, such as graduation ceremonies in public schools, violate the Establishment Clause of the First Amendment.

One of the seminal cases on this issue was decided by the United States Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992). In this case a school district in Rhode Island had enacted a policy that permitted principals to invite members of the clergy to give an invocation and benediction at graduation. *Id.* at 581. A middle school principal invited a rabbi to deliver prayers at graduation, provided a pamphlet called “Guidelines for Civic Occasions” and told the rabbi that the invocation and benediction should be “nonsectarian.” *Id.* A parent of a student filed suit, seeking an injunction to prevent invocations and benedictions in the form of prayer at graduation ceremonies at public schools in the state. On appeal, the United States Supreme Court found that the policy of the school district was unconstitutional.

In reaching its decision, the court noted that the school district’s policy resulted in the school district directing a “formal religious exercise” at a graduation ceremony for public school students and those students who objected to the religious exercise were essentially forced to participate in the exercise if they wanted to attend graduation. *Id.* at 586. The court found the schools district’s involvement in the religious exercise was “troubling” because a school official “decided that an invocation and benediction should be given” and because the school official chose the religious participant and “directed and controlled the content of the prayers.” *Id.* at 587-588. The court found that the “degree of school involvement...made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.” *Id.* at 590.

The court also discussed its long-standing concerns “with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” *Id.* at 592. The court noted that in its previous decisions it recognized “that prayer exercises in public schools carry a particular risk of indirect coercion” and “[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.* The court discussed the public and peer pressure placed on students at a graduation “to stand as a group, or, at least maintain the respectful silence during the invocation and benediction” and that this pressure “though subtle and indirect, can be as real as any overt compulsion.” *Id.* As a result, the state “may not,

consistent with the Establishment Clause, place primary and secondary school children in this position.” *Id.* at 593.

Furthermore, the court found that even if graduation and promotional ceremonies are voluntary, a school district cannot allow the benediction and/or invocation. The court found that the option of not attending graduation does not excuse “any inducement or coercion in the ceremony itself.” *Id.* 595. Also, “Everyone knows that in our society and in our culture high graduation is one of life’s most significant occasions...a student is not free to absent herself from the graduation exercise in any real sense of the term ‘voluntary’ for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.” *Id.*

In conclusion, the court stated: “[t]he sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.” *Id.* at 599.

Subsequent to *Lee*, the Third Circuit Court of Appeals, in *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996), held that a school board’s policy allowing a senior class to vote to determine if prayer would be included in graduation violated the Establishment Clause of the First Amendment. The school board had a longstanding tradition of including “a nonsectarian invocation and benediction in high school graduation ceremonies.” *Id.* at 1474. The prayers were delivered “by local clergy on a rotating basis in an attempt to afford different denominations the opportunity to be represented.” *Id.* However, after the Supreme Court’s decision in *Lee*, the school board, in a good faith attempt to comply with *Lee*, decided to reconsider the tradition and adopted a policy instead. The policy the board adopted stated that the board of education, administration and staff of the schools “shall not endorse, organize or in any way promote prayer at schools functions” and “pupils in attendance must choose to have prayer conducted, which must be performed by a student volunteer and may not be conducted by a member of the clergy or staff.” *Id.* at 1475. The policy also permitted the students to decide “how they would determine what form of prayer, if, any would be given at graduation, ‘so long as the process was conducted by elected class officers and the survey provides pupils with an opportunity to choose prayer, a moment of reflection or nothing at all.’” *Id.* Furthermore, the policy required that the printed programs “include a disclaimer explaining that any presentation that may be given at commencement did not reflect the views of the School Board, the School District, administrators, staff or other students.” *Id.*

Thereafter, the principal explained the board’s policy during morning announcements over the public address system. The senior class president then explained that a poll would be taken of the senior class. The vote was taken the next day and 128 students voted for prayer, 120 for reflection/moment of silence and 20 students for neither to occur. Students then volunteered to deliver the prayer and senior class officers selected a student from among the volunteers. *Id.*

The Third Circuit Court of Appeals found that the policy violated in the Establishment Clause of the First Amendment. First, the court found that the policy allowed the 128 seniors who wanted verbal

prayer at graduation “to impose their will upon 140 of their fellow classmates who did not.” *Id.* at 1477. The court found this was impermissible because “the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.” *Id.* (internal citations omitted). The court found that “[a]n impermissible practice can not be transformed into a constitutionally acceptable one by putting a democratic process to an improper use.” *Id.* “The electorate as a whole, whether by referendum or otherwise, could not order [governmental] action violative of the [Constitution], and the [government] may not avoid the strictures of [the Constitution] by deferring to the wishes or objections of some fraction of the body politic.” *Id.* at 1477-1478 (internal citations omitted).

Importantly, the court stated that “[h]igh school graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed and exchanged.” *Id.* at 1478.

The school board argued that the student referendum distinguished the case from *Lee*, but the court did not agree. The court noted that the school district’s involvement in this case “is certainly less evident” than in *Lee*, however, “the student referendum does not erase the state’s imprint from this graduation prayer.” *Id.* at 1479. The court stated that graduation at this high school, “like graduation at nearly any other school, is a school sponsored event. School officials decide the sequence of events and the order of speakers on the program and ceremonies are typically held on high school property at no cost to the students.” *Id.* As result, graduation is characterized by “order and uniformity” and school officials “retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress and the decorum of the students.” *Id.* The district delegated only one aspect of the ceremony to a plurality of the students, and this delegation “does not constitute the absence of school officials’ control over the graduation.” *Id.* The students only decided the question of prayer at graduation because “school officials agreed to let them decide that one question.” *Id.* While this delegation “may appear to many to be no more than a neutral means of deciding whether prayer should be included in the graduation, it does not insulate the School Board from the reach of the First Amendment.” *Id.* The court found that the control exercised by the school district in this case “although different in degree than was present in *Lee*, is not sufficiently distinct to require a different result under the first dominant of factor of *Lee*.” *Id.* at 1480.

The court found “no difference whatsoever between the coercion in *Lee* and the coercion here.” *Id.* Any objector’s presence at “his or her graduation compels participation in the religious observation decreed by results of the poll that is sanctioned under [the policy]” and “[t]his the Constitution does not allow.” *Id.* In this case, the board’s policy would have required 140 unwilling students to participate in student-led worship. “It is beyond dispute that, at a minimum the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.” *Id.* (internal citations omitted). In this case, as in *Lee*, “the prayer exercises are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.” *Id.* (internal citations omitted). The students at this school had to “either conform to the model of worship commanded by the plurality or absent themselves from graduation and therefore forego one of the most important events in their lives. That is an improper choice to force upon dissenting students.” *Id.*

The court further states that the school board in this case “cannot sanction coerced participation in a religious observation merely by disclaiming responsibility for the content of the ceremony.” *Id.* at 1482.

The court also rejected the school board’s argument that the inclusion of prayer “solemnizes the graduation.” *Id.* at 1485. The court said it was “unable to understand why graduation would be any less solemn if students were not permitted to vote for prayer, a moment of silence or no observance at graduation.” *Id.* Furthermore, even if the policy served the secular purpose of solemnizing graduation, the court found that the policy did so in an impermissible manner.” *Id.* The policy “puts such students on the horns of an impossible dilemma by forcing them to choose between doing violence to their own religious beliefs and voting, or abstaining and thereby risking that their forbearance may provide the margin of victory for those with a different religious preference. Regardless of how the referendum comes out, this state policy has forced such a student into an impossible and impermissible choice.” *Id.*

Furthermore, when determining whether a policy complies with the principles established in *Lee*, the United States Supreme Court has examined the context that led to the adoption of the policy. In *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), the school district had enacted several policies regarding prayers at graduation and student-led, student-initiated prayer at football games. The United States Supreme Court, in reviewing the policy regarding student-led, student-initiated prayer at football games stated that they “refuse to turn a blind eye to the context in which this policy arose and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.” *Id.* at 315.

## **CONCLUSION**

Based on the foregoing cases, it is our opinion that the district’s longstanding policy of having a student, selected by a panel of teachers, conduct an invocation and/or benediction at graduation is a violation of the Establishment Clause. While the board does not have a written policy regarding invocations and benedictions, the tradition of teachers selecting a student to provide the invocation and/or benediction bares the imprint of the of the school district, entangles the schools district in religion and establishes that the district is participating in a religious exercise. As a result, the longstanding tradition puts school-aged children, in the courts’ view, who object to prayer, in an untenable position and essentially coerces them to participate in a religious exercise, or forego the tradition of attending graduation. As discussed in detail above, both the United States Supreme Court and the Third Circuit Court of Appeals have found such a practice to be a violation of the Establishment Clause.

Based on the above cases, in our opinion, it is not likely that the board could adopt a policy that would allow a student to provide an invocation and/or benediction that would not violate the Establishment Clause. As the court found in the *ACLU* case, allowing the students to decide if a prayer, or moment of reflection should occur at graduation still violates the Establishment Clause. The court found that delegating this authority to students still showed the district maintained control over the graduation.