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GRADUATION PRAYER

Overview

As June 2003 approaches, high school seniors and their parents eagerly await graduation (commencement) exercises. Graduations are "exciting" and "happy" times. Students experience a sense of accomplishment and relief while their parents, grandparents, and other relatives are filled with pride. High school principals, classroom teachers, and other staff members look forward to graduation exercises as the capstone event bringing the school year to a close.

Ironically, however, the weeks leading up to the ceremony are not free of problems. Some seniors scheduled to "march" may receive an unexpected notice that they cannot participate because they are one credit or more short of meeting requirements, or because they have failed a required course. Others may be notified that they cannot participate in the ceremony because of "senior week" misbehavior in violation of the school system's disciplinary code.

The graduation ceremony itself is never problem-free. One perennial and highly emotional problem involves the tradition of including prayer. More specifically, a problem still facing public school officials in May 2003 involves whether or not to include a formal invocation at the beginning and a benediction at the close of the June graduation ceremony? A corollary question is whether or not to invite a member of the local clergy to deliver the prayers?

Emerging Issues:

In June 2003, graduation prayer should not be an issue, but it is. More than a decade ago, the United States Supreme Court directly addressed the constitutionality of graduation prayer in public schools. In Lee v Weisman (1992) the Court held that *officially sponsored and organized prayers at public school graduation ceremonies violate the First Amendment's Establishment Clause.* Despite the Supreme Court's pronouncement, in some communities the inclusion of graduation prayer remains a part of this year's event. Should a formal, officially organized invocation and benediction be included in a graduation (commencement) ceremony at a public school? Applying the Weisman rule the answer to the question clearly is "No." It is obvious, however, that some confusion remains. To understand the source of confusion, one must begin by stepping back and

briefly reviewing a sampling of court decisions (including both school prayer and related cases) leading up to and following the Weisman decision.

Case Law:

Historical antecedents. More than fifty years ago, the United States Supreme Court declared religious instruction on public school property unconstitutional. McCollum v Board of Education (1948) Four years later, in upholding the release of public school students (during the school day) to attend religious instruction off school grounds, the Supreme Court cautioned that classroom teachers must refrain from "coercing students to participate" in the released time program. Zorach v Clauson (1952).

The Supreme Court first ruled on the constitutionality of prayer and Bible reading in public schools in a case out of New York, Engel v Vitale (1962). In Engel, graduation prayer was not the specific issue; rather, the case involved a recommendation of the New York State Board of Regents that a specific prayer (written by the State) be recited at the beginning of the school day in all public schools. Some parents challenged the prayer recommendation on grounds that it violated the Establishment Clause of the First Amendment. The Supreme Court agreed and held that state government had no business in carrying on any program of "government-sponsored prayer."

In 1963, the Supreme Court decided School District of Abington Township v Schempp. The case involved both prayer and Bible reading as devotional exercises conducted at the beginning of each school day, in the public schools of Pennsylvania. Characterizing the exercises as "religious ceremonies," the Court saw them as a breach of neutrality between church and state in violation of the First Amendment's Establishment Clause. One year after Schempp, the Supreme Court held in Chamberlin v Dade County (1964), that the "recitation of prayers in schools" was unconstitutional under the First Amendment's Establishment Clause.

The Lemon Standard. In 1971, the Supreme Court (by an 8 to 0 vote) created a *three-pronged standard* to apply when searching for possible Establishment Clause violations. Lemon v Kurtzman (1971) In determining whether or not a publicly sponsored program, activity, or act violates the Establishment Clause one must ask: (1) Does the program, activity, or act have a *secular legislative purpose*? (2) Does the primary effect of the program, activity, or act either *advance or inhibit religion*? (3) Does the program, activity, or act *excessively entangle government and religion*? This standard would become the primary tool of analysis, and would be consistently relied on by federal judges for three decades in deciding religion-education controversies, including graduation prayer.

Lower Courts Send Mixed Messages. Despite the Supreme Court's rulings in Engel, and Schempp, and the consistent application of the Lemon standard, many traditional religious practices in public schools did not end. Thus, during the early 1970's and through the decade of the 1980's, litigation actually multiplied. One highly active source of litigation was prayer at public school graduation exercises, where resulting lower court decisions gave mixed messages to public school officials. For example, in one jurisdiction a court ruled that organized graduation prayers could be said (Grossberg v Deusebio, 1974); yet, a court in another jurisdiction reached an opposite conclusion, even though the prayers were interdenominational and voluntary (Bennett v Livermore Unified School District, 1987). Thus, whether or not prayers at public school graduation ceremonies met constitutional muster depended on where the school happened to be located.

It should be noted that the Supreme Court itself added to the confusion. For example, in a non-school case, the Court upheld a prayer being said at the opening of a state's legislative body. To the high court, such prayers are

secular (i.e., *ceremonial*) in nature and are not "religious activities." More specifically, the Court saw the prayers as being a part of the *historical fabric and tradition* of conducting public meetings. Marsh v Chambers (1983) One year later the Supreme Court warned against government "endorsement" of religious activities (this case involved a nativity scene on public governmental property during the Christmas season), but opined that an activity could shed its "religiosity" and become "secular" in nature. Lynch v Donnelly (1984)

Minutes or Moments of Silence. The 1980s and 1990's produced a related line of litigation. In these cases plaintiffs alleged that state legislative bodies (e.g., Virginia) were busy passing statutes returning officially sanctioned prayer to public schools under the *pretext* of a "minute or moment of silence" at the beginning of the school day. Significant in the judicial analysis of these newly enacted statutes was an examination of the legislative record. In searching for a possible constitutional violation (i.e., a religious purpose) judges probed the legislative record in search of: (1) the *actual intent* of the drafters and supporters of the legislation, and (2) the exact statements of legislators (and other government officials) in *supporting* and *endorsing* the new legislation. Wallace v Jaffree (1985)

A recent decision of the United States Court of Appeals for the Fourth Circuit offers a good example of the above judicial analysis in action. In Brown v Gilmore (2001), the Virginia Moment of Silence statute (Code of Virginia, 22.1-203), which makes a daily moment of silence mandatory in every public school in the Commonwealth, was declared not to be offensive to the First Amendment. The law's *intent* is clear, said the Fourth Circuit; namely, to establish one moment silence in school within which silent prayer is but one option available to students.

Graduation Prayer. As stated earlier in this commentary, the Supreme Court directly addressed graduation prayer in Lee v Weisman (1992). By a vote of 5 to 4 the Court held that a clergyman's delivery of an invocation and a benediction at a public middle school graduation, even where the prayers are non-sectarian in nature, was an unconstitutional violation of the Establishment Clause. Justice Kennedy for the majority characterized the direct involvement of school officials (especially the school principal) as "pervasive to the point of creating a state-sponsored and state-directed exercise in a public school." The degree of involvement of school officials in this case, he said, "made it clear that graduation prayer bore the imprint of the State and put school-aged children who object in an untenable position."

In his analysis of the issues presented, Justice Kennedy fashioned and used a new standard---"*coercion*." He was convinced that in this case the *pervasive involvement* of the middle school principal in organizing, selecting the clergy person to deliver the prayers, and implementing the graduation prayers, amounted to *coercion.* As a result, said Justice Kennedy, the students forfeited their liberty. More specifically, they conformed and showed tacit approval of the prayers by standing silent, simply because they viewed the prayers as endorsed by and bearing the "official imprimatur"of the school system.

Confusion Continues. It has been more than a decade since the Supreme Court handed down Weisman. Over the past ten-plus years, some lower courts have continued to send mixed messages regarding graduation prayer. Some examples follow.

In a decision from the United States Court of Appeals for the Fifth Circuit, graduation prayers that were "student-initiated and student led" were held constitutional. Jones v Clear Creek (1992) Yet, in 1993, a federal district court in Virginia ruled against student-initiated and conducted prayers at a public high school graduation. Gearon v Loudoun County Schools (1993)

The Fifth Circuit, in Ingebretsen v Jackson (1996), struck down a state statute allowing student-initiated prayers during all compulsory events held on school property. That same year the Third Circuit held, in a New Jersey case, that graduation prayers violated the Establishment Clause even though senior students voted whether or not to include prayers during their graduation ceremony. ACLU v Black Horse Pike Regional Board of Education (1996)

In 1997, a federal district court in Idaho held that allowing high school seniors chosen by academic standing in their class to deliver uncensored presentations, including prayers, as a part of graduation ceremonies, did not violate the constitution. Doe v Madison School District (1997) In 2003, the Ninth Circuit held that public school officials do not violate a student speaker's freedom of expression by reviewing the proposed graduation speech in an effort to eliminate religious, proselytizing remarks. Lassonde v Pleasanton Unified (2003)

The United States Supreme Court has ruled against organized prayers at public high school football games, even when student-initiated, student-led, and held outside in the football stadium violated the constitution. Santa Fe I.S.D. v Doe (2000). Finally, in a case headed for the Supreme Court, a three-judge panel of the Ninth Circuit ruled that a policy requiring public school students to recite the Pledge of Allegiance violated the Establishment Clause. The constitutional issue in the case focused on the words "under God" in the Pledge. Once again, the notion of *coercion* played a significant part in the judicial analysis. To the three-judge panel, students were being "impermissibly coerced to participate" in an act that is basically "religious" in nature. Nedow v U.S. Congress (2003) Since the whole Ninth Circuit Court has refused to rehear the three-judge panel's decision the lower court ruling stands at this time.

Policy Implications:

As the above court decisions demonstrate, confusion exists in the post-Weisman era regarding the status of graduation prayer in the public schools. Thus, it is little wonder that in May 2003 public school officials face difficult decisions concerning the possible inclusion of a prayer at this year's commencement ceremony. It is not too late, however, to examine school system policies (and practices) in an effort to avoid problems. What follow are some suggestions to consider as the audit moves forward. Be certain that school board policies (and practices):

- Comply with the Supreme Court's ruling in Lee v Weisman (1992), regarding officially sponsored, organized, and supported prayers at public school graduation ceremonies.
- Comply with state law regarding student-initiated prayer on school grounds and at school-sponsored functions including graduation ceremonies.
- Clearly state that the graduation ceremony is a *limited purpose, short-term ceremonial event* solely intended for recognizing, honoring, and awarding diplomas to graduating students.
- Forbid administrators, teachers, other staff, parents, and students from initiating, organizing, and conducting religious ceremonies, devotional sessions, religious services, or other sectarian activities as a part of the graduation ceremony.
- Include and treat as significant the expectations and wishes of the senior class in planning the graduation ceremony and other graduation-related activities.
- Specify that all graduation speakers, including student speakers, be expected to refrain from making religiously oriented remarks intended to proselytize and/or indoctrinate those in attendance at the graduation ceremony.
- Require that all student speakers submit their remarks to the staff member in charge of the graduation ceremony at least two weeks prior to the actual ceremony.

- Establish a formal mechanism for dispute resolution to be automatically activated if and when an issue arises.

One final note must be added. Recently, the United States Department of Education released guidelines on prayer in public schools. In this writer's opinion, the specific guidelines that apply to graduation prayer have the potential of creating conflicts of law between the federal guidelines, existing court decisions in the various federal circuits, and the substantive law of several states.

On balance, however, the new federal guidelines set forth two basic requirements. First, public school officials must not officially organize and endorse formal prayers or religious exercises as a part of graduation ceremonies. Second, while students are not free to use graduation as they please, their free exercise of religious expression must be recognized and respected. As such, it behooves public school officials to proceed with caution and seek legal advice from the board's attorney at every stage in the policy drafting process.

Resources Cited:

Abington Township v Schempp, 374 U.S. 203 (1963)

ACLU v Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3rd Cir. 1996)

Bennett v Livermore Unified School District, 238 Cal. Rptr. 819 (Cal.App. 1987)

Brown v Gilmore, 258 F.3d 265 (4th Cir. 2001)

Chamberlin v Dade County, 377 U.S. 402 (1964)

Code of Virginia, 22.1-203, 22.1-203.1, and 22.1-203.2 (2002 Cum. Supp.)

Doe v Madison School District, 7 F.Supp.2d 1110 (D. Idaho 1997)

Engel v Vitale, 370 U.S. 421 (1962)

Gearon v Loudoun County, 844 F.Supp. 1097 (E.D. Va. 1993)

Grossberg v Deusebio, 380 F.Supp. 285 (E.D. Va. 1974)

Ingebretsen v Jackson, 88 F.3d 274 (5th Cir. 1996)

Jones v Clear Creek, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993)

Lassonde v Pleasanton Unified, 320 F.3d 979 (9th Cir. 2003)

Lee v Weisman, 112 S.Ct. 2648 (1992)

Lemon v Kurtzman, 403 U.S. 602 (1971)

Lynch v Donnelly, 465 U.S. 668 (1984)

Marsh v Chambers, 463 U.S. 783 (1983)

McCollum v Board of Education, 333 U.S. 203 (1948)

Nedow v U.S. Congress, 220 F.3d 597 (9th Cir. 2002)

Santa Fe I.S.D. v Doe, 120 S.Ct. 2266 (2000)

Wallace v Jaffree, 472 U.S. 38 (1985)

Zorach v Clauson, 343 U.S. 306 (1952)

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Note: The views expressed in this commentary are those of the author.