

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

June 22, 2011

Mr. Arnold Adair
Superintendent
Deer Park Independent School District
203 Ivy Ave
Deer Park TX 77536

Re: Prayer at Deer Park High School Graduation

Dear Mr. Adair:

I am writing on behalf of an area resident and taxpayer, and other Texas members of the Freedom From Religion Foundation (FFRF), who object to the delivery of prayer at a public high school graduation. FFRF is a national nonprofit organization with over 16,500 members across the country including over 700 in Texas. Our purpose is to protect the constitutional principle of separation between state and church.

It is our information and understanding that an invocation and benediction were part of the Deer Park High School graduation. The ceremony took place Friday, June 3, 2011. It is our understanding these were student led and that the audience was asked to remain standing for the invocation. It is our further understanding a Texas statute recommends that the programs distributed to all guests include a disclaimer regarding the messages delivered by student speakers.

As you are aware, the Supreme Court has continually struck down prayers at school-sponsored events, including public school assemblies and graduations. *See Lee v. Weisman*, 505 U.S. 577 (1992)(declaring unconstitutional clergy-delivered prayers at a public school graduation). Even if student-initiated, school officials may not invite a student, teacher, faculty member, or clergy to give any type of prayer, invocation, or benediction at a public high school-sponsored event. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)(holding that student-delivered prayers at high school football games violate the Establishment Clause).

We are aware that Texas has passed the "Religious Viewpoints Antidiscrimination Act" (RVAA) and has encouraged the adoption of a "state model policy." Tex Educ. Code § 25.156. Although the Fifth Circuit has not yet ruled directly on the constitutionality of the RVAA, there is strong reason to believe that certain provisions of the RVAA – specifically, the redefinition of a public school graduation

ceremony as a "limited public forum" so as to allow prayer at school graduations - would be found unconstitutional.

A public school graduation cannot logically be conceived as such a forum, no matter the creative redefinition offered by Texas Education Code § 25.156. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 820. ("Neither its character nor its history makes the subject graduation ceremony in general or the invocation and benediction portions in particular appropriate fora for such public discourse."); *Brody v. Spang*, 957 F.2d 1108, 1117 (3d Cir. 1992) ("Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views.") (quotation and citation omitted).

For obvious reasons, graduation ceremonies -- in particular, the invocation and benediction portions of graduation ceremonies -- are not the place for exchanges of dueling presentations on topics of public concern...Such presentations would undoubtedly clash with a ceremony's "primary activity." Indeed, a graduation ceremony comprises but a single activity, which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints. *Santa Fe*, 168 F.3d 806, 820. (citations omitted)

It is difficult to conceive of a school that would open its graduation ceremonies to this sort of dialogue by providing general access to the student body. As in *Santa Fe*, Texas

has simply concocted a thinly-veiled surrogate process by which a very limited number of speakers -- one or two -- will be chosen to deliver prayers denominated as invocations and benedictions...[The school] has thus granted no one, not even the students elected to give the invocations and benedictions, "indiscriminate use" of its government controlled channel of communication. *Id.* at 820.

The assertion that the prayers are constitutional because Texas school district policies have redefined "limited public forum" to include graduation ceremonies is untenable. Like previous schools attempting this circumvention of clear legal precedent, your school district has invoked the cover of "limited public forum" in order to reclassify the invocations, benedictions, and other prayers as private student speech rather than public speech. However, the Supreme Court has not been impressed by similar attempts to reclassify an invocation as "private speech." See *Santa Fe*, 530 U.S. 290, 302. ("These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.") The Court stated,

[I]t is clear that the pregame ceremony is not the type of forum discussed in [other cases dealing with limited public forums].

The...school officials simply do not "evince either 'by policy or by practice,' any intent to open the [ceremony] to 'indiscriminate use,'...by the student body generally." Rather, the school allows only one student...to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message...As we concluded [previously], "selective access does not transform government property into a public forum." *Id.* at 303.

...Additionally, the fact that only one student is permitted to give a content-limited message [an "invocation"] suggests that this policy does little to "'foster free expression." ...[T]he use of an invocation to foster [solemnity] is impermissible when, in actuality, it constitutes prayer sponsored by the school...(citations omitted) *Id.* at 309.

Your district's graduation policy reflects the precise constitutional concerns addressed in *Santa Fe* in other regards as well. For example,

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. ... It is in a setting such as this that "the board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. ... Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable...prayer as stamped with her school's seal of approval.

...The delivery of such a message – over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer – is not properly characterized as "private" speech. *Id.* at 307-310.

Neither does a disclaimer magically transform the invocation practice into a public forum for private speech. A public school that has a policy of selecting speakers for an officially designated prayer at an official school ceremony cannot claim that it has created an open forum. That is affirmed by the fact that the policy provides that the

school maintains control over who speaks (students only, and even then, only certain students) and what they are allowed to say (an invocation and a benediction, with the speeches screened by the administration prior to delivery). The "message that is expressly endorsed in the text is an 'invocation' -- a term that primarily describes an appeal for divine assistance...the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy." *Id.* at 306-307. "[T]he degree of school involvement' makes it clear that the [prayers] bear 'the imprint of the State and thus put school-age children who objected in an untenable position.'" *Id.* at 305, quoting *Lee*, 505 U.S. 577, 590. The prayers are government speech. Of course, "government speech must comport with the Establishment Clause." *Pleasant Grove City, Utah v. Sumnum*, 129 S.Ct. 1125, 1127 (2009).

Texas Education Code § 25.156 attempts to distinguish school graduations from the football pregame prayers specifically reviewed by the Supreme Court in *Santa Fe*; however, if anything, the admonishment against prayer at sporting events is even more pertinent as applied to the highly coercive nature of a high school graduation. See *Santa Fe*, 530 U.S. 290, 300 (the presence at a graduation event is even less voluntary and more coercive than attendance at a high school football game, because a high school graduation is "a significant, once-in-a-lifetime event."); *Lee*, 505 U.S. 577, 597 (the "constraining potential of the one school even most important for the student to attend" means that "[t]he influence and force of a formal exercise in a school graduation are far greater than the [legislative assembly's opening] prayer exercise we condoned in *Marsh*"); and *Id.* at 596 ("The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.").

Furthermore, rather than adhering to *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (CA5 1992), Texas's justification for ignoring the Supreme Court precedent laid out in *Santa Fe*, the Texas Education Code § 25.156 is doubly problematic in light of subsequent rulings. See *Santa Fe*, 168 F.3d 806, 821, citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) ("Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Clear Creek II* does not hold to the contrary.") As the Fifth Circuit held in *Santa Fe*, 168 F.3d 806, 815-816,

...*Clear Creek II* did not hold that a policy is insulated from constitutional scrutiny under the Establishment Clause merely because it permits, rather than requires, religious speech when selected and given by students.

Fortunately, it is not necessary to attempt to reconcile the two unworkable propositions that a high school graduation is both a limited public forum and that the school can limit sectarian prayers, which are clearly unconstitutional, because

the Supreme Court has settled this matter—high school graduations must be secular to protect the freedom of conscience of all students.

The School District has a legal duty to remain neutral toward religion. By scheduling such unlawful graduation prayers, the District abridges its duty to remain neutral and flouts two direct Supreme Court decisions. Therefore, we request immediate written assurances that Deer Park Independent School District will take the appropriate steps to ensure that the district high schools are not scheduling religious practices as part of their graduation ceremonies or any other school-sponsored events.

Sincerely,

A handwritten signature in blue ink that reads "Stephanie A. Schmitt". The signature is written in a cursive, flowing style.

Stephanie A. Schmitt
Staff Attorney