

**Overview and Analysis of the Pending  
*American Humanist Association vs.  
Greenville County School District* Case and  
Current State of the Law on Student-  
Initiated Religious Speech and School Use  
of Religious Facilities**

SC COSA Fall Legal Summit

August 26, 2016

Thomas K. Barlow, Esq.  
Childs & Halligan, P.A.

The undersigned's most overwhelming rhetorical reaction to all of this is how in 2015 is there still any debate or legal nuance to hash over prayers at graduation?

*Judge Hendricks' Order Granting Partial Summary Judgment, May 18, 2015*

# Factual Chronology

**Beginning of time** – Mountain View Elementary School (MVES) includes opening and closing prayer in 5<sup>th</sup> Grade awards program

- **May 2012** – MVES holds 5<sup>th</sup> grade awards program at North Greenville University 's Turner Chapel for first time
- **Spring 2013** – Principal announces 2013 program will be held at Turner Chapel

- **May 2013** – Program held at Turner Chapel and Doe Family attends
  - 2 students say brief opening and closing prayers
- **June 2013** – AHA contacts superintendent and principal regarding awards program
- **June 2013** – Greenville General Counsel responds
- **September 2013** – AHA sues District, principal, and superintendent in D.S.C.

# Closing Prayer 2013

“Thank you for coming. Let us pray. Dear Lord, thank you for this day and all your many blessings upon us. Lord, bless each and every one of our teachers, leaders and parents. Lead, guide and direct us as we begin this new adventure into middle school. We give you the praise for all our accomplishments. In Jesus’ name I pray. Amen.”

# Relevant Precedent – Student Religious Speech

*Lee v. Weisman (1992)* – school can't sponsor cleric to deliver non-denominational prayer at graduation

*Santa Fe Indep. Sch. Dist. v. Doe (2000)* -policy permitting student vote on student led prayer before football games unconstitutional

*Mellen v. Bunting, 327 F.3d 355 (4<sup>th</sup> Cir. 2003)* – VMI-sponsored student-led dinner prayers unconstitutional

# Circuit Split

- Eleventh Circuit – *Santa Fe* and *Weisman* are distinguishable on their facts and not all truly student-initiated public religious expression allowed in public schools violates the Establishment Clause. *Adler v. Duval Cnty. Sch. Bd.* (2001), *Chandler v. Siegelman* (2000)
- Other circuits generally— school districts ‘ efforts to provide student-initiated and student led public religious messages violate the Establishment Clause
- South Carolina student-led messages statute , S.C. Code Ann. § 59-1-441, mirrors Eleventh Circuit holdings in *Adler* and *Chandler*.

# Relevant Precedent – Use of Religious Facilities

- *Doe v. Elmbrook School District*, 687 F.3d 840 (7<sup>th</sup> Cir. 2012)

School's use of non-denominational mega-church's sanctuary for HS graduation violates establishment clause. Main features.

- Christian iconography and messaging throughout facility
- Proselytizing materials in the sanctuary, Bibles, hymnals
- Involvement of church staff manning booths, handing out information

- *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580 (6<sup>th</sup> Cir. 2015). School District did not violate Establishment Clause by entering arm's-length contract with religiously affiliated program to run alternative school with non-proselytizing secular curriculum and facility.

# Use of Turner Chapel

- 7<sup>th</sup> Circuit Elmbrook case distinguishable
  - No NGU involvement
  - Limited iconography
  - Limited school, school district involvement
  - No proselytizing, handouts, information provided to students



TURNER AUDITORIUM

NAMED  
IN HONOR OF

MR. R. R. TURNER, SR.

FRIEND AND TRUSTEE  
BENEFACTOR FOR OVER

35 YEARS

1958











# District Response – Student Messages

With regard to a student delivering a prayer or providing a religious message during a school-sponsored event, the District will not prohibit this practice as long as the prayer or message is student led and initiated and does not create a disturbance to the event. Prohibiting such independent student speech would go beyond showing neutrality toward religion but instead demonstrate an impermissible hostility toward religion.

If a student is selected to speak based upon genuinely neutral criteria such as class rank or academic merit, that student should have the same ability to decide to deliver a religious message or prayer as another student has the ability to decide to speak about an inspirational secular book or role model. Any religious speech under that scenario is attributable to the individual student and not to the District. This content and viewpoint neutral position respects student individuality and expression.

# Injunction Sought

Defendants, their successors and any person in active concert with the Defendants from knowingly, intentionally, or negligently allowing: (i) prayers to be delivered as part of any school-sponsored event, including but not limited to graduation ceremonies; and (ii) school sponsored events, including graduations, to be held in churches, chapels and other places of worship or similar religious venues, including but not limited to the [Turner] Chapel or other locations on the campus of the Christian University or any other sectarian institution.

# Judge Anderson Preliminary Injunction Ruling - Best Quotes

- This complaint looks like it was written by a P.R. man!
- I got up this morning. And on the front page of the Greenville News, where – that’s the newspaper. where this school is located and about all these horrible things they did. I says [sic] that’s not the Greenville school district that I’m familiar with.”
- This is what you call, in my opinion, making a mountain out of a molehill.
- There’s a hell of a lot worse things than a prayer.

# District Court Ruling

- Report and Recommendation by Judge Austin—deny Turner Chapel injunction on merits, student religious messages injunction is moot
- Judge Hendricks rules opposite
  - Turner Chapel injunction mooted by Does' move to another attendance area
  - Denies permanent injunction on student messages on merits

# Past Practice

To the extent the plaintiffs seek to enjoin the kind of official and school-sponsored student prayers, which were held as a formal part of graduations in the school district in 2013 and prior, the injunction is granted. The defendant concedes that such formal and sponsored prayers are unconstitutional and should no longer be allowed.

# Distinguished *Santa Fe*, Other Wink/Nod Cases

- No selection process or election. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Am. Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1478 (3d Cir. 1996); *Gearon v. Loudoun Cnty. Sch. Bd.*, 844 F. Supp. 1097, 1099 (E.D. Va. 1993).
- Does not invite prayer or religious speech.

The new position of the defendant, here, is both neutral and passive. On its face, it does not invite any prayer or speech, sectarian or otherwise; it cannot be said to be coercive. It prescribes nothing. There is nothing about the new position on graduations that suggests any role whatsoever in the schools attempting to make space available for invocation. There is certainly no process or mechanism associated with any prayer as in the numerous case examples above.

“[T]he Supreme Court has never held that the mere fact that private religious speech occurs during school hours is sufficient to render it state speech.” *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 282 (4th Cir. 1998).

# Lemon Test - Secular Purpose

The purpose of the current position is secular insofar as it governs a civil ceremony in graduation and protects the fullest liberties in speech for its participants. It is not any endorsement. It is a distancing.

# Lemon Test - Primary Effect

The *de minimis* incidents of religious messaging in 2014 do not say otherwise. And, as discussed, this Order is effective to enjoin all such future practices. The new position, however, is so finely weighted, in balance, that literally the only additional protection would be complete proscription of all religious comment, which is impermissible as stated.

# Lemon Test - Entanglement

The defendant is not entangled with religion at all. The position requires and expects no involvement of the schools in any decision of any individual student to include any religious point of view.

# Chandler v. Seigelman, II

- As the *Chandler II* court noted: Private speech endorsing religion is constitutionally protected—even in school. Such speech is not the school's speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non-believer students . . . . The injunction also forbids the school district from “permitting” students to speak religiously in any sort of public context. This it cannot constitutionally do. The Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students’ secular speech.

# Issues on Appeal

- Did the District Court abuse its discretion in denying the Appellants permanent injunctive relief that would have required the School District to prospectively prohibit any student selected upon neutral, secular criteria to speak at a public event from delivering a message from a religious perspective?

# Issues on Appeal

- Did the Does' move from the School District to Alabama during the pendency of this appeal render their claims for declaratory and permanent injunctive relief moot and deprive this Court of jurisdiction?
- Did the District Court err by failing to consider a second, separate award of nominal damages for the Turner Chapel venue aspect of the 2013 awards program?

# AMICUS BRIEFS

# Oral Argument

- AHA doubles down on “any public religious speech allowed by School District is Establishment Clause violation”
- Facial vs. “as applied” challenge questions
- Equal access /viewpoint discrimination arguments
- Focus on mootness and standing
  - Turner Chapel issues
  - Associational standing for student messages issue

# Issues on Remand

- Do the Does get another \$1 for the Turner Chapel aspect of the 2013 program?
- Does AHA have associational standing to continue the appeal without the Does?
- If AHA has associational standing, should the District Court's prior ruling be modified in any way?

# Take-Aways

- § 59-1-441 policies likely to survive a facial challenge
- As –applied challenges will be more problematic in a lot of places in South Carolina based on history and local custom
- Expect more facilities use challenges from this group
- Expect challenges from the other side if you try to eliminate all public religious speech