Appignani Humanist Legal Center

1777 T Street NW, Washington DC 20009-7125 | T 800.837.3792 202.238.9088 | F 202.238.9003 | legal@americanhumanist.org | www.humanistlegalcenter.org

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Dr. Elizabeth Fagen – Superintendent
Humble Independent School District
20200 Eastway Village Drive
Humble, TX 77338

elizabeth.fagen@humble.k12.tx.us

April Maldonado – Principal
Eagle Springs Elementary School
12500 Will Clayton Parkway
Humble, TX 77346

april.maldonado@humble.k12.tx.us

RE: Constitutional Violation

Dear Dr. Fagen and Ms. Maldonado,

This office was recently contacted by the parent of a student from Eagle Springs Elementary School who reports what she correctly perceives as a serious constitutional violation, more specifically a violation of the Establishment Clause of the First Amendment of the United States Constitution. As our office had previously contacted your school district last year regarding a different church-state concern—a Christian radio station was given access to a class for programming purposes—we are left with the conclusion that your district has little regard for the requirements of the Establishment Clause and in fact has developed a pattern of violating those standards.

In the instant case, which occurred on September 28, several elementary school teachers participated in group prayer exercises with students on school grounds. Moreover, not only did these teachers participate, but they even led the students in prayer. A photograph of this activity is attached to this letter, and we do have others, including a video.

This was all done in conjunction with an organized effort called "See You At The Pole," which is initiated and promoted by various Christian groups across the country. This is a plainly religious exercise on school grounds, just before the start of the school day as children are arriving, in which public school staff should not be participating. Such activities obviously send a strong message of religious endorsement and favoritism, leaving non-Christian students and

families as outsiders. Such exclusion has no place in a public school supported by taxpayers of all faiths and no faith.

The purpose of this letter is to put you on notice that the activities are unconstitutional and to seek your assurances that they will not occur again. If it does not, your school district is inviting litigation. The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Texas. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the First Amendment rights to free speech and religious liberty. Our legal center includes a network of cooperating attorneys from around the country, including Texas, and we have litigated constitutional cases in state and federal courts from coast to coast, including Texas.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Courts "pay particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Id.* at 592. Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "'may not favor religious belief over disbelief.'" *Id.* at 593 (citation omitted). Indeed, the Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.*

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In applying these general principles to the context of public schools, the Supreme Court has emphasized that courts must defend the wall of separation with an even greater level of vigilance because "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

With these principles in mind, the Supreme Court has specifically ruled: 1) that the state must not place its stamp of approval on prayers by authorizing them at school-sponsored events; and 2) that including prayers school-sponsored events (such as assemblies and graduations) unconstitutionally coerces students to participate in religious activity. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee*, 505 U.S. at 590-92. Indeed, *Lee* and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 165 (5th Cir. 1993).

[1] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

The Supreme Court has issued numerous decisions "of considerable parentage that prohibits prayer in the school classroom or environs." *Id.* at 164.[2] The same is true of Fifth Circuit cases. *See Doe v. Sch. Bd*., 274 F.3d 289, 294 (5th Cir. 2001) (statute authorizing prayer in classrooms unconstitutional); *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (graduation and football prayers unconstitutional); *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir. 1996) (prayers at school-sponsored events unconstitutional); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 407 (5th Cir 1995) (*Duncanville II*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Duncanville I*, 994 F.2d at 163; *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (classroom prayers by students and teachers unconstitutional); *Hall v. Board of Sch. Comm'rs,* 656 F.2d 999, 1003 (5th Cir. 1981) (permitting students to conduct morning devotional readings over the school's public address system violated Establishment Clause); *Meltzer v. Bd. of Pub. Instruction,* 548 F.2d 559, 574 (5th Cir. 1977) (en banc) (same). *See also Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 591 (N.D. Miss. 1996) (same).

Courts have also held that the inclusion of prayer in a school assembly is unconstitutional. *Ingebretsen*, 88 F.3d at 280 (assemblies and other school sponsored events); *See A.M. v. Taconic Hills Cent. Sch. Dist*., 510 Fed. Appx. 3, 7-8 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 196 (2013); *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981) (student assembly); *S.D. v. St. Johns County Sch. Dist*., 632 F. Supp. 2d 1085, 1100 (M.D. Fla. 2009) (same); *Golden v. Rossford Exempted Vill. Sch. Dist*., 445 F. Supp. 2d 820, 823-25 (N.D. Ohio 2006) (same). *See also Mellen v. Bunting*, 327 F.3d 355, 367, 370-72 (4th Cir. 2003) (supper prayers at military school violated Establishment Clause).

Significantly, in *Doe v. Wilson Cnty. Sch. Sys*., the court held that a school unconstitutionally endorsed religion when teachers participated in a similar flagpole prayer event and further held that there was no "secular purpose supporting the flagpole event." 564 F. Supp. 2d 766, 778, 801 (M.D. Tenn. 2008),

When the government sponsors an "intrinsically religious practice" such as prayer, it "cannot meet the secular purpose prong" of the *Lemon* test. *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 829-30 (11th Cir. 1989). *See Stone v. Graham*, 449 U.S. 39, 41 (1980); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd* 472 U.S. 38 (1985); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) (no secular purpose in authorizing teacher-initiated prayer at the start of school day) *aff'd*, 455 U.S. 913 (1982).[3] A religious purpose may be inferred in this

[2] *See Santa Fe*, 530 U.S. at 294 (student prayers at football games unconstitutional); *Lee*, 505 U.S. at 580-83 (1992) (prayers at graduation ceremonies unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 40-42 (1985) (school prayer and meditation unconstitutional); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 205 (1963) (daily scripture readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (school prayer unconstitutional). *See also Allegheny*, 492 U.S. at 590 n.40.

[3] *See also North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981) ("the invocation of assemblies with prayer has no apparent secular purpose"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong).

instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862-63 (2005).

In applying the first prong of *Lemon*, the courts have made clear that because "prayer is 'a primary religious activity in itself,'" a "teacher or administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal." *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students with "let us pray" and ending it with "amen" violated Establishment Clause). *See also Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 830 (11th Cir. 1989) (where school officials sponsor or participate in an "intrinsically religious practice" such as prayer, even if student-led, it "cannot meet the secular purpose prong."). Consequently, the school's inclusion of a Christian prayer in a school-sponsored assembly violates the Establishment Clause under the first prong of the *Lemon* test.

Yet, regardless of the purposes motivating it, the School District's actions fail *Lemon's* effect prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593 (citation omitted). Whether "the key word is 'endorsement' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94. Accordingly, schools cannot "sponsor the . . . religious practice of prayer," *Santa Fe*, 530 U.S. at 313, or otherwise permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999).

A religious activity is "state-sponsored," and therefore unconstitutional, if "an objective observer . . . w[ould] perceive official school support for such religious [activity]." *Board of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990). *See, e.g.*, *Santa Fe*, 530 U.S. at 309-10 (holding that student-initiated, student-led prayers at public high school football game were unconstitutional). Any action by a school official that amounts to "inviting or encouraging students to pray violates the First Amendment." *Herdahl v. Pontotoc County Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996).

A prayer, "because it is religious, . . . advance[s] religion." *Hall*, 630 F.2d at 1021. In *Santa Fe*, the Supreme Court ruled that even student-initiated, student-led prayers at high school football games, where attendance is completely voluntary, result in "both perceived and actual endorsement of religion" in violation of the Establishment Clause. 530 U.S. at 305, 310. Here, students were under the supervision and direction of school officials. In this context, "an objective observer" would inevitably "perceive [the prayers] as a state endorsement of prayer." *Id*. at 308 (internal quotation marks omitted).

Finally, the teachers' participation in the prayer circle fostered excessive entanglement with religion, thus violating the Establishment Clause under *Lemon's* third prong. *See Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion"); *Karen B*., 653 F.2d at 902 (permitting teachers to lead prayers would result in "excessive governmental entanglement with religion."); *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003) (university's sponsorship of prayer failed "*Lemon's* third prong."); *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Hall*, 630 F.2d at 1021 (prayer on a state map fostered unconstitutional entanglement); *Jabr v. Rapides Parish Sch. Bd*., 171 F. Supp. 2d 653, 661 (W.D. La. 2001) ("[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause."). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Educ*., 333 U.S. 203, 212 (1948).[4] In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

In addition to violating the Establishment Clause under the *Lemon* test, *supra*, the school's actions are also unconstitutional under the "coercion test" established by the Supreme Court in *Lee.* The Supreme Court has made clear that "[i]t is beyond dispute that, at a minimum, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. Although "coercion is not necessary to prove an Establishment Clause violation," its presence "is an obvious indication that the government is endorsing or promoting religion." *Id.* at 604 (Blackmun, J., concurring).[5] Students and families, seeing teachers participating in a religious exercise on school grounds, may very well feel coerced to join the exercise to stay in the teachers' good favor. Certainly, at a minimum, most would feel reluctant to speak out against the exercise and the religious message it conveys.

In *Lee*, the Court held that a public school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive, even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586. A school's "supervision and control of a . . . graduation ceremony places public pressure, as well as peer pressure" on students, the Court observed. *Id.* at 593. Students opposed to the prayer are placed "in the dilemma of participating . . . or protesting." *Id.* The Court concluded that a school "may not, consistent with the Establishment Clause, place primary and secondary school children in

[4] *See also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 175 n.36 (3d Cir. 2002) ("'Entanglement' still matters, however, . . . in the rare case where government delegates civic power to a religious group.") (citations omitted).

[5] *See Schempp*, 374 U.S. at 223 ("a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); *Santa Fe*, 168 F.3d at 818 ("we are not required to determine that such public school prayer policies also run afoul of the Coercion Test."); *Carlino,* 57 F. Supp. 2d at 24 ("government endorsement of religion, in the absence of coerced participation, still violates the Establishment Clause.").

this position." *Id.* The facts here are indistinguishable from *Lee*. "A school official . . . decided that an invocation . . . should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at 587. The school official "chose the religious participant" and "that choice is also attributable to the State." *Id.* The "potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent." *Id.* And indeed, "the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." *Id.* at 588.

In view of the aforementioned authorities, it is clear that the School District and its teachers are in violation of the Establishment Clause. As such, the School District and its officials may be sued under 42 U.S.C. § 1983 for damages, an injunction, and attorneys' fees. This letter serves as an official notice of the unconstitutional activity and demands that the School District terminate this and any similar illegal activity immediately. To avoid legal action, we kindly demand that the School District provide us with written assurances that teachers will not be allowed to participate in such activity in the future.

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.