

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

American Humanist Association,)
John Doe and Jane Doe,)
as parents and next friends of their)
minor child, Jill Doe,)
)
Plaintiffs,)
)
v.)
)
Greenville County School District,)
)
Defendant.)
_____)

Civil Action No. 6:13-cv-2471-BHH

ORDER

This matter is before the Court upon Plaintiff American Humanist Association’s (“AHA”) claim against Defendant Greenville County School District (“the school district” or “the district”), seeking injunctive relief as to the district’s current policy regarding prayer at graduation ceremonies.¹ For the following reasons, the Court finds that its prior decision on the prospective prayer claim should be amended as outlined below.

BACKGROUND

The lengthy procedural history of this case is set forth in greater detail in the Court’s prior orders and in the Fourth Circuit’s opinion remanding this matter to this Court for additional consideration, and the Court includes only a brief outline of the facts relevant to the prospective prayer claim. (See ECF Nos. 96, 97, 108, 113, and 121.)

Plaintiffs AHA and John and Jane Doe, as parents and next friends of their minor child, Jill Doe, (“the Does”) initially filed this action against the school district on September

¹ The Court has referred to this claim as Plaintiff’s “prospective prayer claim” in prior orders, and for ease of reference, the Court will continue to do so.

11, 2013, seeking injunctive and declaratory relief and damages under 42 U.S.C. § 1983 to redress the district's alleged violations of the Establishment Clause of the First Amendment. One of Plaintiffs' claims concerns the school district's policy of including sectarian Christian prayers as part of official graduation ceremonies, including at the 2013 Mountain View Elementary School graduation ceremony that the Does attended, where two students, who had been selected by school officials, delivered Christian prayers that were specifically listed as prayers on the printed program for the event.

In an order filed on May 18, 2015, the Court granted Plaintiffs' claim as to the district's inclusion of official and school-sponsored prayers in the years between 1951 and 2013 and awarded \$1 in nominal damages. (ECF No. 97.) The Court stated: "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."² (ECF No. 97 at 7.)

Following the 2013 graduation at Mountain View Elementary School, the school district issued a letter outlining a revised prayer policy, indicating that "any prayer given by a student at a school-sponsored event, including an awards program for Mountain View Elementary, will be under different circumstances than that of the May 30, 2013 program," and further stating:

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

² This holding was not challenged on appeal.

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.

(ECF No. 1 at 23-24, Ex. 6.) The letter also indicated that the school district would “continue to monitor events at Mountain View Elementary School as well as at other schools to ensure that these policies and practices are adhered to through the District.” (*Id.* at 25.)

In its May 2015 order, the Court considered the constitutionality of the district’s revised policy set forth above (the prospective prayer claim) and ultimately held in favor of the school district, concluding that the revised policy, which permitted only student-led and student-initiated prayer, was constitutional because it has “no religious purpose or effect and does not improperly entangle the State with religion.” (ECF No. 97 at 19.) Accordingly, the Court declined to grant permanent injunctive relief prohibiting all prayer from future school events in the school district.

When Plaintiffs appealed the Court’s prior rulings, the school district filed a motion to dismiss the appeal for lack of subject matter jurisdiction based on the Doe family’s relocation to another state. The Fourth Circuit agreed with the school district that, because the Does’ children no longer attended school in Greenville County, they would not be subject to injury from implementation of the revised prayer policy, and the court granted the district’s motion to dismiss with respect to the claims brought by the Does. (ECF No. 113 at 11.) Importantly, however, the Fourth Circuit concluded that AHA may still have an interest in obtaining injunctive relief based on its representation of other AHA members, if

AHA could establish representational standing.

With respect to AHA's attempt to establish representational standing, the Fourth Circuit ultimately declined to consider the supplemental affidavits submitted by AHA, noting that issues of fact arising from those affidavits may require resolution in the first instance. (ECF No. 113 at 15.) Accordingly, the Fourth Circuit vacated and remanded the portion of this Court's decision addressing the prospective prayer claim and instructed this Court to conduct jurisdictional discovery to determine whether AHA still has standing to pursue the prospective prayer claim based on the interests of other members. The Fourth Circuit also indicated that, "[i]f AHA continues to have a live claim, the court should also consider whether its prior judgment on the prospective prayer claim should be amended in any respect." (ECF No. 113 at 16.)

Following remand, the Court permitted jurisdictional discovery as to the issue of AHA's representational standing and set forth a supplemental briefing schedule. Following discovery and supplemental briefing, the Court issued an order on December 12, 2017, finding, *inter alia*, that AHA continues to have standing to proceed on the prospective prayer claim based on its representation of member parents whose children still attend schools within the school district. (ECF No. 121 at 13.) The Court also considered whether its prior decision on the prospective prayer claim should be amended but determined that, based on the amount of time that had passed, the parties should be permitted additional time to submit supplemental briefs and additional evidentiary support. The Court also ordered the parties to submit to mediation to determine whether additional revisions to the school district's prayer policy and/or practices may resolve the issues before the Court. (*Id.* at 18.) When the parties' attempt at mediation proved unsuccessful, the parties filed their

supplemental briefs and additional evidentiary support.

ANALYSIS

As previously explained, in its May 2015 order, the Court held in favor of the school district on the prospective prayer claim. The Court concluded:

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.

(ECF No. 97 at 11.)

The Court considered the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971),³ and concluded that the school district's revised prayer policy "is secular insofar as it governs a civil ceremony in graduation and protects the fullest liberties in speech for its participants." (*Id.* at 16.) The Court explained that no evidence showed that the district's position conveyed a message of endorsement. (*Id.* at 16-17.) And the Court concluded that the district was not entangled with religion because the revised policy requires and expects no involvement of the schools in any decision of any individual student to include

³ In *Lemon*, the United States Supreme Court enunciated a three-part test to determine whether government action violates the Establishment Clause. 403 U.S. at 602. To pass the *Lemon* test, challenged governmental action must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive entanglement with religion. *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003). All three prongs of the test must be met for the challenged action to be constitutional. *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999) ("If a state action violates even one of these three prongs, that state action is unconstitutional."). "The touchstone for [the Court's] analysis is the principle that the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. Am. Civil Libs. Union of Ky.*, 545 U.S. 844, 860 (2005) (internal quotations and citations omitted). "Whether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts Every government practice must be judged in its unique circumstances.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring)). "In the context of school prayer, though, we must give special consideration, under the principles discussed in *Lee* and *Santa Fe*, to whether a state has coerced religious worship." *Mellen*, 327 F.3d at 371.

any religious point of view. (*Id.* at 17.) Accordingly, the Court denied Plaintiffs' request for a permanent injunction prohibiting all prayer during school events.

In the Court's order following remand from the Fourth Circuit, however, the Court explained that it was "inclined to agree with several of its earlier conclusions insofar as the revised policy as *written* appears to pass the *Lemon* test," but the Court further explained that it "has grave concerns about the constitutionality of the actual practices of the school district and the revised policy as *implemented*, as the record now contains evidence tending to show that the school district continues to endorse certain religious activity." (ECF No. 121 at 15.) The Court stated:

In other words, despite the district's assertion that religious messages will be permitted at school events only when they are truly student-led and -initiated (and when the students delivering the messages have been selected based on genuinely neutral criteria), the evidence offered by AHA paints a different picture. For example, according to the affidavits submitted by AHA, even following the school district's revision of its prayer policy, the programs for certain schools' graduation ceremonies ask the audience to stand for particular portions of the ceremonies, which the school district has captioned innocuously as a "welcome," "opening remarks," or "closing remarks," but which merely continue the school district's decades-long practice of including Christian prayers. (See, e.g., ECF Nos. 115-18 at 3; 115-12 at 3; and 115-13.) One school's program dated May 27, 2015, includes an "invocation," despite the fact that the Court's order dated May 18, 2015, stated that "[n]o formal or sponsored 'invocation' or 'inspirational reading' is allowed under the new policy or the prospective instruction of this Order." (ECF Nos. 115-11 at 13 and 97 at 15.) In addition, according to the affidavit of Jeffrey Lamb, a former teacher in the school district, district officials who oversee the speakers at graduation "make it clear to students that prayer is allowed." (ECF No. 115-2 at 3.) Even leaving aside the question of the constitutionality of wholly student-led and -initiated prayers, the evidence submitted by AHA also indicates that the school district endorses other religious messages at its graduation ceremonies. As one example, according to Lamb's affidavit, his daughter is a student at Wade Hampton High School, and at Wade Hampton's 2015 and 2016 graduation ceremonies, the school choir performed the song, "The Lord Bless You and Keep You." (ECF No. 115-2.) See *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F. Supp. 2d 1195, 1197 (S.D. Iowa 2002) (enjoining the singing of the Lord's Prayer by the Woodbine High

School choir at a graduation ceremony as violative of the Establishment Clause).

As the Court remarked in its prior order, “because of the historical inclusion of prayer and religious speech at graduations, in this school district and State, it is conceivable that the cultural residue of prior practices might continue to color and confuse the application [] of, even now, constitutionally neutral practices.” (ECF No. 97 at 9.) Based on the evidence submitted by AHA, it appears that the historical practices of the school district are, in fact, continuing to color and confuse the application of what appears to be a constitutionally neutral prayer policy, but what, in practice, may not be. *See Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906, 926 (W.D. Va. 2012) (noting that “the mere passage of a resolution . . . cannot immunize the body from constitutional challenge where its actual practice fails to meet the standard set forth in its resolution”); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315 (“The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer We 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 15-17 (footnotes omitted).)

Now, after reviewing the parties’ supplemental briefs and exhibits, the Court finds that its concerns as to the school district’s prospective prayer policy,⁴ as implemented, were not unfounded, insofar as it appears to the Court that the district’s current *practices* are not completely neutral toward religion.

Indeed, in its supplemental briefing, the school district admits that graduation ceremonies in 2017 and 2018 included prayers. The district states that there were “just four graduation prayers in 2017,” which the district contends is consistent with its practice of allowing students to control their own messages, treating student secular and religious speech neutrally, and refusing to issue a prior restraint against student speech.” (ECF No.

⁴ Importantly, the policy is no longer entirely “prospective” as several years have passed since its implementation, and the Court may review the policy’s neutrality not only in theory but also in practice.

141 at 1.) The district further states that “of the four schools that included prayer in 2017, only Greer High School and J.L. Mann High School had student speakers include prayers in their remarks in 2018.” (*Id.* at 4.) While the inclusion of these prayers, by itself, may not indicate a lack of neutrality, the Court finds that the inclusion of these prayers in light of the surrounding circumstances does indicate a lack of neutrality.

Specifically, it appears that certain of the graduation programs have continued to ask the audience to stand for student remarks despite the fact that the district’s own guidance provides that “[p]rograms or fliers should not direct the audience or participants to stand for any student message.” (ECF No. 135-72 at 5.) Moreover, at least one of the programs where the audience was asked to stand included a prayer delivered by a student.⁵ (ECF Nos. 135-1 at 12 and 136-4 at 9.) Although Defendant argues that the “please stand” asterisks were included as an oversight or as a matter of convenience based on other portions of the program for which the audience was asked to stand, the Court finds that asking a captive audience to stand while a student delivers a prayer⁶ indicates that the

⁵ At the Berea High School graduation ceremony in 2017, the program asked the audience to stand, and a student delivered the following prayer, which had been submitted to and reviewed by school officials prior to the graduation ceremony: “Please join me in prayer if you will: Dear Heavenly Father, please guide us as we move to the next stage of our lives. In Jesus Name, Amen.” (ECF No. 135-1 at 12.)

⁶ At J.L. Mann Academy’s graduation ceremony in 2017, although the program did not specifically ask the audience to stand for a prayer, the student delivering the prayer, which had been submitted to and reviewed by school officials prior to the graduation ceremony, asked the audience to “stand and bow your heads,” as follows:

Now, as we close this ineffable time in our life, would you please stand and bow your heads in prayer. Dear Lord, Thank you for the many blessings you have bestowed upon us thus far and this great accomplishment in our lives. Our hearts are filled with gratitude and joy for what you have done. The road has been long and at times very difficult, yet you stood by us and helped us along the way. We thank you Lord for our parents, our teachers and our community that have played a vital role in helping us to get where we are. As we take our next step forward, let us not forget all that you have done for us in the past. May we have the courage to stand up for what is right, wisdom to make good decisions, and knowledge to use our abilities to fulfill your goals. May we not forget the values our parents have instilled in us

district's revised policy as implemented has not effectively ameliorated the district's longstanding practice of including formal or official prayers at graduation ceremonies.⁷

As the Supreme Court remarked in *Lee*:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real.

. . .

The injury caused by the government's action, . . . , is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be

and may you continue to guide and protect us as we venture out into the future. Help us to fulfill your great plan that you have laid out for each one of us and may we be servant leaders in everything we do. In you [sic] name we pray, Amen.

(See ECF No. 135-8 at 12-13.)

⁷ Also, at the Greenville High School graduation ceremony in 2017, a student delivered the following "Reflection," which had been submitted to and reviewed by school officials prior to the graduation ceremony:

Dear God,
Thank you for bringing the class of 2017 together today as we celebrate our hard work and accomplishments we have made. We thank you for our military and those who have protected our freedoms. Please bless our teachers that have given us a strong foundation and opportunities to achieve our goals. Inspire the graduates to put to good use all the knowledge, skills and life lessons gained through their time at Greenville High. We thank our friends and family who encouraged us to strive for success along. I thank you for the friendships, spirit, laughter, and memories we've made at Greenville High School. I pray that as we begin the next phase of our lives we look up to you for courage, wisdom, and strength. In God's name we pray, Amen.

(ECF No. 135-5 at 10.)

refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character.

505 U.S. at 593.

Moreover, the Court notes that although the district contends that the student prayers are entirely student-initiated and student-led without input from school officials, the district admits that faculty, administrators, or teachers review the student messages for time, grammar, and syntax. (See ECF No. 136 at 2.) The district claims that school officials do not review the messages for *content*, but the Court is not persuaded by this argument, as the fact remains that school officials do review and approve the students' messages prior to their delivery.⁸ In fact, the school's policy specifically provides that student messages can be reviewed when there is reason to believe they may "foreseeably disrupt the educational environment, contain profanity or be contrary to the District's behavior code." (ECF Nos. 135-72 at 5, 8; see *also* 136-5 at 5 (providing that school officials may *prevent* or remove a speaker under certain circumstances).) Thus, it is clear that school officials do have some measure of control over the content of student messages, despite the district's assertion otherwise.

Ultimately, after reviewing the additional submissions by the parties, the Court agrees with its earlier conclusions as to the first prong of the *Lemon* test, namely, that the district's *position* (but not necessarily its actual practices) straddles the constitutional fence with near perfect symmetry. However, with respect to the second prong of the *Lemon* test, it appears that the Court's prior order (ECF No. 97), which was intended to enjoin the type

⁸ For example, at J.L. Mann Academy, students were asked to submit their speeches in advance "so they may be proofread and approved." (ECF No. 135-8 at 7.)

of formal religious messaging that is still occurring at graduation ceremonies in the district, lacks sufficient specificity to ensure that the district's *practices* do not work a message of endorsement. Moreover, with respect to the third prong of the *Lemon* test, the Court agrees with Plaintiff that the district's *practices* have resulted in excessive entanglement with religion, as outlined in this order and in the Court's prior orders. Accordingly, although the Court declines to broaden this case to the extent suggested by Plaintiff and declines to enjoin all remotely religious messaging or prayer occurring at any school event in the district, the Court hereby amends its prior decision as to Plaintiff's prospective prayer claim and provides a more specific set of guidelines regarding the inclusion of prayer at graduation ceremonies occurring in the district.

CONCLUSION

Therefore, it is hereby **ORDERED** that the Court's prior decision as to Plaintiff's prospective prayer claim is amended as outlined herein, and the following permanent injunction is granted in favor of Plaintiff:

PERMANENT INJUNCTION

(1) The district shall not include a prayer⁹—whether referred to as a prayer, blessing, invocation, benediction, inspirational reading, or otherwise—as part of the official program for a graduation ceremony. The district also shall not include an obviously religious piece of music as part of the official program for a graduation ceremony.

(2) The district and/or school officials shall not encourage, promote, advance,

⁹ In using the term “prayer,” the Court means a communication with a deity including, but not limited to, an invocation, a benediction, or any calling upon a deity to express thanks or to request assistance, guidance, a blessing, or the like. The term does not include a moment of silence, provided that there is no implication that the moment of silence should be used for prayer. The term also does not include customary greetings such as “God Bless You” or “Thank Heavens.”

endorse, or participate in causing prayers during any graduation ceremony.

(3) If any students are selected to make remarks during a graduation ceremony, such students shall be selected (a) based on criteria that are neutral towards religion and (b) in compliance with a written policy.

(4) The district and/or school officials shall not provide copies of student remarks from any prior year's graduation ceremony to any students selected to make remarks during an upcoming graduation ceremony.

(5) The portions of any graduation ceremony devoted to student remarks shall be given the same name in any program or flier, such as "student remarks," "student speech," or a substantially similar, non-religious name. No program or flier may direct the audience or participants to stand for any student's remarks at a graduation ceremony.

(6) If school officials review, revise, or edit a student's remarks in any way prior to the graduation ceremony, then school officials shall ensure that the student's remarks do not include prayer.

(7) If school officials do not review, revise, or edit a student's remarks in any way prior to the graduation ceremony, then a student's remarks may include prayer, provided that no other persons may be asked to participate or join in the prayer, for example, by being asked to stand or bow one's head. Moreover, in the event that a student's remarks contain prayer, no school officials shall join in or otherwise participate in the prayer.

(8) Any program or flier for a graduation ceremony must include the following disclaimer if the ceremony includes a student's remarks: "The views or opinions expressed by students during this program are their own and do not reflect the policy or position of the school district."

(9) The district shall provide school officials with a written policy that includes these guidelines for graduation ceremonies, and the district and/or school officials shall provide a copy of that written policy to any student who is selected to give remarks at a graduation ceremony.

Ultimately, the Court believes that these additional guidelines are necessary under the specific circumstances of this case and that they provide a sufficient balance between the competing interests protected by the Establishment Clause and the Free Speech and Free Exercise Clauses.

AND IT IS SO ORDERED.

/s/Bruce H. Hendricks
The Honorable Bruce Howe Hendricks
United States District Judge

July 18, 2019
Charleston, South Carolina