



# MEMORANDUM

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## Prayer at Public School Sporting Events

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Generally speaking, whether the First Amendment permits prayer offered by a student at an extra-curricular public school event, such as a football game, will greatly depend upon the level of control exerted by the school over the event and the prayer. The historical context of a particular public school's free speech policies and regulations may also play a large part of any Establishment Clause analysis, as well as the public's perception of the school's neutrality regarding religious matters. Two cases decided by the Supreme Court of the United States directly speak to the question at hand: *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

### ***Lee v. Weisman***

The Supreme Court first analyzed the constitutionality of graduation prayer in a context similar (though not identical) to prayer offered at a public school football game, in *Lee v. Weisman*. In *Lee*, principals of public secondary schools in Providence, Rhode Island regularly invited members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. The middle school principal in *Lee* even selected the clergyman to give the prayer (in this case a rabbi) and presented him with a pamphlet setting forth guidelines for "nonsectarian" prayer at school graduations. The Court addressed whether "including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the religion clauses of the First Amendment." *Lee*, 505 U.S. at 580.

Under these facts, the Supreme Court held the graduation prayer unconstitutional, finding that the invocation was directly attributable to the State. The level of involvement and control by school officials was “pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.” *Id.* at 587. “State officials direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools” inasmuch as the principal decided that an invocation and a benediction should be given, and he directed and controlled the prayer’s content. *Id.* at 586–88. The Court concluded that students attending the graduation were in “a fair and real sense” coerced into participating in a religious exercise. *Id.* at 586–87. Thus, state sponsorship was the key problem for the Supreme Court in *Lee*.

### ***Santa Fe Independent School District v. Doe***

Eight years later, the Supreme Court considered prayer in public school again, but on this occasion, the context involved prayer offered by a student at a football game. In *Santa Fe v. Independent School District v. Doe*, the Supreme Court held that the Establishment Clause of the First Amendment prohibits school officials from taking affirmative steps to facilitate prayer at school functions such as football games.

Importantly, *Lee* and *Santa Fe* do not stand for the proposition that all student-led religious speech is unconstitutional if offered at a school event: “[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school[.]day.” *Santa Fe*, 530 U.S. at 313. However, in *Santa Fe*, the Court’s decision turned on several important factors that indicated that the school district, rather than any particular student, was the speaker. *Id.* at 302, 310. Hence, the Court concluded that the pregame invocations were not “private” speech. In reaching this conclusion, the Court considered the prayer’s overall context, the level of government control over the prayer, and whether an extra-curricular setting such as a football game could be considered impermissibly coercive.

#### **1. Overall Context of the Speech**

Concerning overall context in *Santa Fe*, the school district’s policy that permitted a chosen student to deliver a message or invocation during pre-game ceremonies failed to pass constitutional muster because the student’s speech 1) was specifically authorized by a government policy; 2) took place on government property; and 3) occurred during a government-sponsored school-related event. The Court noted, however, that such factors would not amount to an Establishment Clause violation if the government had opened a forum for student speech on an indiscriminate basis, such as was the case in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). 530 U.S. at 302.

In *Rosenberger*, the Court held that a student group that qualified for access to printing service funding on religion neutral criteria may not be discriminated against based on the religious viewpoint expressed in the publication to be printed. However, in *Santa Fe* the Court held that the school district's policy differed from the forum for student speech opened in *Rosenberger*, because it lacked indiscriminate access. *Id.* at 303. In *Santa Fe*, the school only permitted "one student, the same student for the entire season, to give the invocation." *Id.* Although these facts alone might not negate the finding of a forum opened for private student speech, the school's policy also put the student's speech access to a majoritarian vote, ensuring that minority voices would never prevail. *Id.* at 304. This election was distinguishable from other elections, such as elections for a prom king or queen, because under the school district's dual election system, the speaker was elected in a second election *after* the majority's initial determination to have an invocation or message delivered. Moreover, the school district's policy in *Santa Fe* confined the content and topic of the student's speech, *id.* at 303, requiring the speech to solemnize the event, promote good sportsmanship and student safety, and establish an appropriate competitive environment. *Id.* at 298, n.6.

Reviewing the failings of the school district's policy, the Court recalled that such "selective access does not transform government property into a public forum." *Id.* at 303 (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 47 (1983)). The Court also held later in its opinion that the dual election system, particularly in light of the school district's prior history of school-sponsored prayer, encouraged divisiveness along religious lines. *Id.* at 311. Thus, the dual election system "[did] not insulate the school from the coercive element of the final message." *Id.* at 310. The District chose to hold the election, and thus, there was no real student choice in the matter. *Id.*

## **2. Actual and Perceived Government Endorsement through Control**

Under the Supreme Court's Establishment Clause jurisprudence, federal courts will consider whether the level of control over the relevant speech exerted by government indicates that government has actually endorsed religious speech or could be perceived by an objective observer as endorsing religious speech. One relevant question asks "whether an objective observer acquainted with the text, legislative history, and implementation of the statute [or policy, or practice], would perceive it as a state endorsement of prayer in public schools." *See id.* at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73, 76 (1992) (O'Connor, J., concurring in judgment)).

In *Santa Fe*, the Supreme Court found both an actual and perceived endorsement of religion as a result of the school district's level of involvement through its policy. 530 U.S. at 305. For example, the school board explicitly chose to permit students to deliver a brief invocation or message. *Id.* at 306. Also, the latest revision of the school district's prior policies

set in place a dual election method, requiring that elections be conducted by the high school student council “upon the advice and direction of the high school principal.” *Id.* Further, the speech had to be “consistent with the goals and purposes of th[e] policy,” which [were] “to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.” *Id.* The Court found that the school district “invite[d] and encourage[d] religious messages” within the policy text. *Id.* The policy used the word “invocation” (meaning, “an appeal for divine assistance”) and any “message” would necessarily have to “solemnize” the event, which most likely would require a religious message. This was particularly true because *Santa Fe’s* students would consider and understand that the District’s prior policies had included the word “prayer.” *Id.* at 306–07.

Even beyond the policy’s text, the Supreme Court held that the school district in *Santa Fe* violated the Establishment Clause through the pre-game ceremony setting; the Court held that objective students would “unquestionably perceive the inevitable pregame prayer” as stamped with the school’s seal of approval. *Id.* at 308. For example, the Court considered the audience, the delivery mechanism, and surrounding indicia containing the school’s logo. The invocation or message would be delivered to an assembly gathered for the purpose of a regularly scheduled, school-sponsored function, conducted on school property. *Id.* at 307. Additionally, the invocation and/or message would be broadcast over the school’s public address system which remained under the school’s control. *Id.* Further, school sporting event tradition normally boasts team members, cheerleaders, and band members dressed in school uniforms bearing the school’s name and mascot; the school’s name and mascot usually adorn the playing field, banners, and flags as well. *Id.* at 307–08.

### **3. Deference to Government’s Stated Secular Purpose**

Generally, the Court will accord deference to government’s stated secular purpose behind an “arguably religious policy.” *Id.* at 308. With regard to the school district’s policy in *Santa Fe*, however, the Court held that “invocations” are not necessary to foster solemnity at football games (or to foster free expression, promote good sportsmanship, or to establish a safe and appropriate environment for competition). *Id.* at 309. Additionally, the Court observed that even if solemnity at a football game were appropriate, solemnity may not be constitutionally fostered through school-sponsored prayer. *Id.* The Court also surmised that it could not surmise a message that would “be both appropriately ‘solemnizing’ under the district’s policy and yet non-religious.” *Id.* The Court, however, found even more telling the school district’s historically regular practice permitting student-led prayer during athletic events, together with the school’s failure to hold a new election after amending its policy for the final time. *Id.* On final revision, the word “prayer” was removed and replaced with the words “messages,” “statements,” and “invocations.” *Id.* at 297–98. This policy change (without any new election) indicated to the Court that the school district specifically intended to preserve its prayer practice before football games. *Id.* at 309. Thus, even if a school’s policy states a non-religious purpose on its face,

under the Supreme Court’s Establishment Clause jurisprudence, a court may look behind the text to determine whether a religious purpose was the true reason for enactment.

#### **4. Social Coercion by Government**

Finally, the Court in *Santa Fe* brushed aside any argument that no coercion could have taken place at a football game because such events are extracurricular, and thus voluntary. The Court disagreed that attendance at a football game would be voluntary for some students—for example, cheerleaders, band members, and team members who are required to attend (and some for class credit). *Id.* at 311. Additionally, some students may feel social pressure to attend extracurricular events. *Id.* at 311–12. Thus, even if attendance were purely voluntary, the Court held that the prayer would still have the impermissible effect of coercing those present to participate in an act of worship, and social pressure may not be used indirectly to do what the school cannot do directly. *Id.* at 312.

#### **Conclusion**

Although the ACLJ does not necessarily agree that the Court came to all the correct conclusions in *Lee* and *Santa Fe*, the decisions stand nevertheless. After the Court’s decision in *Santa Fe*, please understand that public school officials and courts in the various jurisdictions will likely view prayer during extra-curricular sporting events with caution, taking care to avoid Establishment Clause violations. However, students and their parents or guardians should be aware that public schools may open forums for student speech, even inadvertently through practice. *While we again caution you that this memo is for informational purposes and does not constitute legal advice or representation by the ACLJ*, please allow us to encourage you to contact us immediately should a question arise regarding student speech rights during extra-curricular events, or otherwise. For example, should a public school open a forum for student speech, whether by policy or practice, a student may have the right to express his religious viewpoint on an equal basis with other speakers.