



American Civil Liberties Union
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May 24, 2010

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Ms. Leslie Taylor
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Re: Prayers at Graduation Ceremony at MSU-Northern Spring 2010

Dear Cathy and Leslie,

I am writing on behalf of the ACLU of Montana Foundation and as a follow-up to our telephone conversations regarding this year's graduation ceremony at MSU-Northern. As I indicated to you on the phone, we have received complaints from a number of professors at MSU-Northern regarding the invocation and benediction given by Pastor Tim Zerger at the Graduation Ceremony. Also, Leslie, thank you for the information that you have emailed to me.

My understanding of the circumstances is the following: A committee made up of administrators, staff and faculty was responsible for planning the commencement this year, and decided to have a Native American drum service and a benediction as part of the ceremony. They attempted to contact the Havre Ministerial Association, but the president was out of town. A member of the group offered to ask his pastor, Pastor Zerger, an evangelical minister, who is a member of the Havre Ministerial Association. There have been several accounts of how invocations and benedictions were handled in the past. Some people recall not having invocations and benedictions, others recall that they were held in the late 1990's and early 2000's, and others say they were only sporadic or occasional. Nonetheless, invocations and benedictions have not been a regular, historical or traditional part of the MSU-Northern graduation ceremony. In the past, the Havre Ministerial Association has recommended someone



to give the invocation and benediction, but it is unclear when this was.

It is my understanding that a member of the faculty learned a couple of weeks prior to the ceremony that plans were being made to have an invocation and benediction at the Graduation Ceremony. This faculty member talked with the Executive Secretary to Chancellor Trocki, and advised her that if there was going to be an invocation and benediction, arranging for them should be handled carefully and in a nonsectarian manner.

Evidently, there is no tape or recording of the invocations or benedictions. It is unclear whether or not Pastor Zerger has retained a copy of what he said. Nonetheless, I have confirmed through a number of sources that Pastor Zerger referenced Jesus Christ as a personal savior a number of times during the benediction. They felt this was proselytizing. Such a prayer would comport with the precepts of the Community and Missionary Alliance, with which Pastor Zerger is aligned.

Some professors have described their reaction as “offended;” others as “shocked” and “surprised.” They were particularly troubled because faculty attendance at the Graduation Ceremony is mandatory. Section 410 of MSU-Northern’s Administrative Policy and Procedures Manual states:

Policy

It is a professional obligation of all Montana State University-Northern administrators, professional staff, and faculty to attend the annual commencement ceremony.

Procedures

Requests for absences from our annual commencement ceremony should be in writing to the Chancellor stating reason for absence. Requests will be weighed against the following criteria:

1. The absence is necessary for attendance at a professionally related activity which cannot be scheduled at another time: summer session, workshop, etc.
2. The absence is necessary for compelling reasons of a personal nature: illness, graduation of a close relative at another campus on the same date, etc.

Moreover, it is my understanding that the collective bargaining agreement between the MSU-Northern and the faculty requires attendance at the Graduation Ceremony. The announcement for Spring Commencement states, “All graduates and faculty are expected to participate in the Commencement exercises. Please notify the Registrar, in writing, if you are unable to attend.”

In *Lee v. Weisman*, 505 U.S. 577 (1992), the United States Supreme Court held that invocations

and benedictions in the form of prayer were unconstitutional with respect to primary and secondary education. Although the Court reserved applying its holding to higher education, many of the principles relied upon in *Lee* are applicable to the invocation and benediction at MSU-Northern. In *Lee*, the school principal had selected a rabbi to give the invocation and benediction, and provided him with a pamphlet with guidelines for giving a nonsectarian prayer. The Court stated that “it is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” 505 U.S. at 587, quoting *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Court then stated unequivocally that the school’s involvement in the school’s prayers had violated these central principles. A school official, the principal, decided that an invocation and benediction should be given. This decision was 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.*

The importance of respecting the separation of church and state cannot be overstated. The Court in *Lee v. Weisman* emphasized that one timeless lesson from the history of the Establishment Clause and the First Amendment is “that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” 505 U.S. at 592. The Court condemned the pressure placed on the students to stand as a group or, at least, to maintain a respectful silence during the invocation on students, noting that this pressure “can be as real as any overt compulsion.” 505 U.S. at 593. Although the school officials had said that attendance at graduation was voluntary, the Court stated such a distinction between voluntary and involuntary lacks force where a student must give up attending graduation in order to be free from a government-sponsored religious exercise. The school therefore had left the student with no alternative but to submit, allowing no opportunity for a reasonable dissenter to do anything but participate in the exercise.

Similarly, here, the Chancellor at MSU-Northern selected the pastor – a pastor who represents a church dedicated to proselytizing. At least one attendee has characterized the pastor’s benediction as “proselytizing.” Participation by faculty and staff was not voluntary, but required by university policy and contract. There was direct compulsion to attend a religious exercise sponsored by the State, contravening the basic tenets of the Establishment Clause.

Not only did the invocation and benediction violate the Establishment Clause, they also violated the Montana Constitution. From its inception, Montana has expressly prohibited combining religious services with educational activities. Article X, §7 of the Montana Constitution is derived from the 1889 Constitution, and prohibits expressly the invocation and benediction given here. Article X, Section 7 provides:

Section 7. Nondiscrimination in education. No religion or partisan test or qualification shall be required of any teacher or student as a condition of admission into any public education institution. **Attendance shall not be**

required at any religious service. No sectarian tenets shall be advocated in any public educational institution of the state. . . .

This provision, read in conjunction with the principles in *Lee v. Weisman*, make it clear that an institution of higher education in Montana cannot require faculty and staff to attend a graduation that includes an invocation and benediction that are effectively religious services. This provision and the Establishment Clause are the bulwarks of freedom of religion. It is the firm belief in the *freedom* of religion that precludes the State from sponsoring religious exercises and favoring one religion over another.

Although the United States Supreme Court has not addressed the application of *Lee v. Weisman* to a university, the 6th and 7th Circuit Court of Appeals have addressed this issue – both involving situations distinctly different from that at Northern. In *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), the Court held that the giving of a nonsectarian invocation and benediction at Indiana University was constitutional. The Court emphasized that the giving of such a nonsectarian invocation and benediction had occurred since 1840, with a rotation of different ministers and religious leaders invoking a deity, but not promoting any one religion over another. The Court held that such a tradition and the nonsectarian nature of the invocation and benediction operated not so much as a religious exercise, but to solemnize the occasion. The Court further emphasized that attendance at the graduation was voluntary – there was “no coercion—real or otherwise—to participate.” 104 F.3d at 985.

The circumstances in *Tanford* were distinctly different from those at MSU-Northern. It is my understanding there has *not* been a long tradition of holding an invocation and benediction. They have occurred occasionally, but not regularly. It is my information that the Havre Ministers Association was not contacted to hold a nonsectarian ceremony. A proselytizing pastor was instead selected. Attendance by staff and faculty was mandatory, rather than voluntary. *Tanford* therefore holds little, if any, persuasive application here.

Likewise, the situation in *Chaudhuri v. State of Tennessee*, 130 F.3d 232 (6th Cir. 1997), was distinctly different from that at MSU-Northern. In *Chaudhuri*, Tennessee State University had originally allowed nonsectarian invocation and benedictions. In 1988, however, the general counsel for the Tennessee University System advised that prayers at university events were constitutional if they did not appear to favor or endorse any particular religious view, and so he recommended a moment of silence rather than actual prayer. In 1993, moments of silence rather than nonsectarian prayers were instituted at the university. During the moment of silence a group spontaneously recited the Lord’s Prayer. The 6th Circuit held that the Establishment Clause was not violated because the nonsectarian prayers and moments of silence did not have a “secular purpose”, but rather to memorialize a public occasion. The Plaintiff teacher was not required to attend the graduation ceremony and the record did not support the teacher’s assertion that his evaluations could be affected. The Court also held that the teacher as an adult was not as subject to indoctrination as the students in *Lee v. Weisman*.

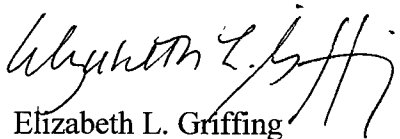
The graduation ceremony at MSU-Northern was not part of a tradition solemnizing a public occasion. The invocation and benediction were religious exercises – just as the Court in *Lee v. Weisman* recognized that such prayers are religious exercises in the secondary school context. They were religious exercises sponsored by the State, and attendance was required by the State at these religious exercises. *Tanford* and *Chaudhuri* are both readily distinguishable.

The Establishment Clause and the Montana Constitution were clearly violated based upon numerous grounds: the absence of a regular tradition or past practice that indicated the prayer was merely nonsectarian solemnization of the graduation; the selection of a proselytizing pastor despite the warning to consider a nonsectarian presentation; the actual texts of the invocations and benedictions which favored one religion over another; and the mandatory attendance requirement.

The ACLU of Montana requests that the Board of Regents take immediate steps to review the graduation ceremony at MSU-Northern, and confirm that the invocation and benediction were unconstitutional and inappropriate. A formal apology should be issued by the administration at MSU-Northern which recognizes and appreciates that the State may not sponsor religious exercises, and demonstrates a sensitivity and respect for the beliefs of people of different faiths or for people who are simply reasonable dissenters in participating in such an exercise.

I would be happy to meet with you to discuss this further.

Sincerely,



Elizabeth L. Griffing
Legal Director
ACLU of Montana Foundation

cc: Chancellor Frank Trocki
Sheila Stearns, Commissioner of Higher Education
Members of the Board of Regents