IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-D-0972 (CBS)

SEAN SHIELDS, and
ASHLEE SHIELDS, by and through her father and next friend, SEAN SHIELDS,

Plaintiffs,

v.

KIOWA COUNTY SCHOOL DISTRICT NO. RE-2, and
SCHOOL BOARD OF KIOWA COUNTY SCHOOL DISTRICT NO. RE-2,

Defendants,

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs Sean Shields ("Sean") and Ashlee Shields ("Ashlee"), by and through counsel, James W. Hubbell of Kelly|Haglund|Garnsey+Kahn LLC and Mark Silverstein of the American Civil Liberties Union of Colorado, submit this brief in support of their motion for Temporary Restraining Order and Permanent Injunction. Plaintiffs have brought this suit to redress violations of the Establishment Clause at the Plainview School, in particular its policy requiring students to vote whether to deliver a "message" in place of its annual prayer service at graduation ceremonies which are to be held on May 25. The law governing this action is set forth in *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

FACTS

The focal point of the important constitutional issues raised in this case is Plainview Jr-Sr High School ("Plainview School"), a public junior-senior high school administered by Kiowa County School District No. RE-2 (the "District") and its School Board (the "Board'). Plainview School is located in the tiny community of Sheridan Lakes in Kiowa County, Colorado. Fifty-eight students attend the school, while the town of Sheridan Lakes itself has a population of only about 100 persons.[1] The community and its religious leaders are deeply involved in the activities and operations of Plainview School, consequently there is no clear boundary between the school's and community's activities.[2] This integration of community and school no doubt is a great benefit to teachers, students, and parents. At the same time, however, it has also fostered an impermissible integration of the community's religious activities into the operation of Plainview School.

For many years, school-sponsored prayer and religious activities have been a fact of life in Plainview school. Prayers are virtually always delivered at school sponsored and organized events and meetings where meals are served, and are sometimes delivered by the

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[1] Census reports indicate that in 1999, Sheridan Lakes had a population of 98 persons in 1999 out of Kiowa County's population of 1634. http://www.census.gov/population/estimates/metro-city/placebyco/SC99T8_CO.txt.

[2] The *Santa Fe* Court emphasized that this kind of Establishment Clause challenge requires that all of the pertinent "social facts" be considered. 530 U.S. at 315.

District Superintendent or Board members. At the beginning of the current school year, teachers were required to attend the annual teacher in-service orientation where Christian prayers are routinely given before lunch by a Christian minister who attends for that purpose. (Sean's affidavit, attached as Exhibit A, at ¶¶ 16-17.) The District asserts that it has no written policy governing prayer, student "messages" or student speeches at graduation ceremonies or any other school events. *See* letter from District Superintendent Johnny B. Holcomb to James W. Hubbell (5/8/02) and attached letter (Exhibit B.).

Notwithstanding the Supreme Court's unambiguous holding in *Lee v. Weisman*, 505 U.S. 577 (1992), Plainview School's combined ceremony for graduating seniors and continuing 8th-graders (the "graduation ceremony") for many years opened with a sectarian prayer delivered by a minister. (Exhibit A at ¶¶ 9-10.) Sean, a new teacher at the school, complained about this practice just before the 2001 graduation ceremony. Apparently in response to Sean's complaint, the school changed its policy from the annual minister-delivered prayer to a student vote on whether to have prayer. The school required graduating seniors to vote on whether to have prayer, a moment of silence, or no message at all delivered at graduation. The seniors initially voted to have a moment of silence rather than a prayer. Predictably, in the face of vehement protests, the seniors then overturned this vote and voted instead to open the ceremony with a prayer, continuing what plaintiffs understand to be an unbroken string of prayer at graduation ceremonies. (Exhibit A at ¶¶ 12-15.) The

District sanctioned this breach of its own policy in order to ensure that a prayer was delivered at the graduation ceremony. Plaintiffs understand that a modified but similar procedure may govern the delivery of a student-delivered "message" at the opening of this year's graduation ceremony on May 25. (Exhibit A, at ¶¶ 28-30.)

Plaintiffs are Sean Shields, a teacher at Plainview School, and his 13-year-old daughter Ashlee, a 7th-grade student at the school. Sean is the faculty sponsor of the continuing 8th grade class and as such is required to attend the graduation ceremony.

Ashlee was chosen to be an usher at this year's graduation ceremony and wishes to attend it. Next year, as an 8th grader, she would be required to attend the graduation ceremony. Her affidavit is attached as Exhibit C.

In these circumstances, the District's practice and policy favoring prayer at graduation ceremonies and the student "message" to be given at the May 25th graduation ceremony , along with the practice of school sponsored prayer at teacher in-service training, facially violate the Establishment Clause and must be enjoined under the *Santa Fe* opinion, 530 U.S. 290.

STANDARDS FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIVE RELIEF.

The standard for granting a preliminary injunction in the Tenth Circuit is clear:

> [T]he moving party bears the burden of showing (1) the injunction, if issued, would not adversely affect the public interest, (2) irreparable harm would occur unless the injunction

issues, (3) the threatened injury outweighs any harm an injunction may cause the opposing party, and (4) the party has a substantial likelihood of success on the merits.

Kansas v. United States, 2001 U.S. App. LEXIS 8159, at *33 (10th Cir. May 4, 2001) (citing *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999)). Where the first three factors have been shown, "the Tenth Circuit has applied a more liberal standard to the likelihood of success prong, stating that 'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.'" *S.W. Shattuck Chemical Co., Inc. v. City and County of Denver* , 1 F.Supp.2d 1235, 1238 (D. Colo. 1998) (quoting *Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981)). Generally, these same standards govern the issuance of a temporary restraining order. *See generally*, Wright & Miller, Federal Practice & Procedure § 2951. However, where grave harm is threatened, the applicant need show only that the claims provide a fair ground for litigation. *Kansas Hospital Association v. Whiteman*, 835 F. Supp. 1548 (D. Kan. 1993).

I. PLAINTIFFS HAVE A HIGH PROBABILITY OF SUCCESS ON THE MERITS.

A. THE DEFENDANTS' PRACTICES AND POLICIES ARE UNCONSTITUTIONAL UNDER SANTA FE V. DOE.

1. The *Santa Fe* Decision.

The Supreme Court's decision in *Santa Fe,* 530 U.S. 290, governs efforts by school officials to evade First Amendment restrictions on school prayer by delegating to students the responsibility for selecting and delivering a "message," which may include

prayer, at a school function. In *Santa Fe*, the plaintiff challenged a high school's policy under which high school students voted by secret ballot about whether to have a pre-game "invocation and/or message" at pre-game ceremonies at football games. If they chose to have a message, the students were to elect a student from a list of student volunteers to deliver the message. The student volunteer "may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy."

A strong majority of the Court found the policy to violate the Establishment Clause. Closely examining the particular facts and circumstances before it, the Court found that the policy ran afoul of its prior decision in *Lee v. Weisman*, 505 U.S. 577 (1992), even though it did not require prayer at football games.

In *Lee,* the Court held that a public school violated the Establishment Clause by selecting a member of the clergy to offer a prayer at a public high school graduation ceremony.[3] The holding of *Lee* is summarized in its final paragraph:

> The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a

[3] As *Lee* makes plain, it is the prayer itself--and not whether it is offered by clergy or nonclergy that offends the Constitution. Were it merely the fact that clergy delivered the prayer that made it objectionable, the Court's holding would not be grounded on the effect on the audience, but on the identity of the speaker.

> religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

Id. at 599. Even though attendance at the graduation ceremony was voluntary, the key to the *Lee* decision was the inherently coercive impact that school-sponsored prayer has on students with other beliefs: "To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high." *Id.* at 597. That fact alone was sufficient to find an Establishment Clause violation: "[B]y any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause." *Id*. at 598.

2. Application to Facts

With *Lee* as a backdrop, the *Santa Fe* Court employed a fact-driven analysis focusing on five considerations in deciding to enjoin the delivery of student "messages" at football games: (1) whether the school *sponsored* prayer by having prayers recited at school sponsored events in the guise of a student message (530 U.S. at p. 302 *et seq*.), (2) whether the likelihood that the policy will foster *viewpoint discrimination* (*id.* at p. 304 *et seq*.), (3) the *coercive* effect of the policy (*id.* at p. 310 *et seq*.), (4) whether the school appears to be endorsing prayer (*id.* at p. 305 *et seq*.), and, as a part of a facial challenge,

and taking into account the facts as a whole, (5) the *purpose* of the policy (*id.* at p. 30 *et seq.*). There is compelling evidence of each of the factors here.

1. *Sponsorship*. Unlike the school district in *Sante Fe,* the District does not have a written policy governing prayer or "student messages" at graduation ceremonies and other events at Plainview School. In the circumstances, the District's policy must be inferred from the past and present practices of Plainview School.

As in *Lee* and *Santa Fe*, graduation ceremonies are planned and organized by Plainview School. The graduation ceremony is presided over by a school official. It takes place in the school gymnasium. School officials plan and sponsor the graduation ceremony. (Exhibit A at ¶15.) Each year, the school selects teachers to act as *sponsors* (the school's term) for each class of students. The class sponsor for the continuing 8th-grade class and the graduating senior class are required by the District to coordinate and participate in graduation ceremonies. (Exhibit A at ¶30.)

Until 2001, and only when Sean and a graduating senior objected, each graduation at Plainview School opened with a prayer by a local minister notwithstanding that such a practice had been clearly unlawful since the 1992 *Lee* opinion. Last year, the school directed students to vote on whether to have no prayer, prayer, or a moment of silence. When the students chose a moment of silence, school officials received a number of protests from individuals in the community protesting the absence of Christian prayer at

graduation. Under pressure, the students decided to hold a new election, where they chose to have a prayer, even though the existing policy did not provide for a revote. The District did nothing to uphold the application of its policy in the face of such pressure. The District attended and accepted the new vote. (Exhibit A at ¶¶ 9-14.) Graduation was held at on school grounds, and opened with a prayer.

Indeed, the fact is that Plainview School has continued to this day to sponsor prayer at graduation despite its patent illegality. It sanctioned minister-led sectarian prayer at graduation for years after it was declared unconstitutional in *Lee*, and determinedly continues to this day to sponsor sectarian prayer by ministers and District personnel in other school activities. *See Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 at 1167 n.7 (7th Cir. 1993) (school context imbues conduct that in another setting might be private with an official quality). Plainview educators and board members could not be so unfamiliar with judicial restrictions on school-sponsored prayer to have been oblivious to the legal implications of their actions. The District's history of indifference to well-known constitutional constraints on school sponsored prayer demonstrates that prayer at school activities like graduation ceremonies is not only sponsored by the school, but endorsed by the school despite its illegality.

In this case, the inference of sponsorship is strengthened by the environment in which prayers are given. Prayer is pervasive at Plainview School and so thoroughly

supported by the administration that it would be extraordinarily incongruous for it not to be sponsored. As is set forth in Sean's affidavit, ministers or school officials routinely give prayers before meals at school sponsored events even those that take place on school property. Lunch at the annual in-service training sessions—mandatory for teachers such as Sean—begins with a prayer. (Exhibit A, at ¶17.) Last year, the prayer was given by District Superintendent Johnny Holcomb. Potluck dinners at Community Forums to address school issues that are organized by the District and held on school grounds and the athletic banquet customarily are accompanied by a Christian prayer (Exhibit A at ¶¶18-20.)[4]

2. *Viewpoint Discrimination*. The *Santa Fe* Court has made it amply clear that student elections whether or not to have prayers at school events do not pass muster under the Establishment Clause because they discriminate against the minority on the basis of viewpoint. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Supreme Court ruled that elections that determine

[4] On May 16, 2002, for the first time the athletic banquet opened with a moment of silence. By that time, District officials were aware that plaintiffs' counsel were investigating religious activities at the school and school-sponsored events. Sean attended the banquet. (Exhibit A at ¶20.)

which expressive activities are to receive school funds are constitutionally problematic because by definition they are not viewpoint neutral:

> To extent that the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.

Id., 529 U.S. at 235, *cited in Santa Fe*, 530 U.S. at 304.

The *Santa Fe* Court expanded on *Southworth*: "[T]he majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." 530 U.S. at 304. Moreover, "this student vote [for prayer at football games] does nothing to protect minority views but rather places the students at the mercy of the majority." *Id.* The policy applied to the 2001 graduation ceremony—a student vote on whether to have a prayer, a moment of silence, or nothing—guaranteed that the only verbal message that could be delivered at graduation prayer. (Exhibit A at ¶ 12.)

The constitutional infirmities of the District's practices are compounded by the absence of any written policy governing prayer at school sponsored events generally. This permits school personnel to make inconsistent, ad hoc determinations about prayer at school events. Moreover, it makes it easy for the District to manipulate its policy as needed, just as it did in 2001, to ensure that school sponsored prayer will remain a fixture

at Plainview School. Finally, it creates a moveable target for any potential plaintiff claims. Therefore, the absence of a written policy governing prayer and other religious activities at Plainview School substantially enhances the likelihood of viewpoint discrimination, coercion, and de facto sponsorship and endorsement of school prayer.

3. *Coercion.* The Supreme Court has made it plain that

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. [Citations omitted] . . . [A]mong other things . . . prayer exercises in public schools carry a particular risk of indirect coercion.

Lee, 530 U.S. at 591. "To say that a student must remain apart from the [ceremony] at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high." *Id.* at 596.

Ultimately, the *Lee* Court found that even a nonsectarian public prayer at a graduation ceremony at which attendance was voluntary was so inherently coercive to students that it violated the Establishment Clause: "the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause." *Id.* at 598. The *Santa Fe* Court found an unconstitutional degree of coercion present in the much less coercive atmosphere of a high school football game where elected students provided "messages" over a public address system. 530 U.S. at 311-12.

Ashlee's circumstances underscore the Court's findings on coercion. She is thirteen years old and a seventh grade student at Plainview School. She is very uncomfortable at events where prayers or religious talks are given or religious songs are sung, and it makes her feel left out. She does not want to stay in these circumstances, but becomes embarrassed and self-conscious if she leaves the room. (Exhibit C at ¶3.)

Ashlee has been elected by the eighth grade to be an usher at this year's graduation and continuation ceremony for seniors and eighth graders. Only two seventh grade students are chosen each year to be ushers, and she is proud and happy to be chosen. She thinks it would be exciting and interesting to go. (Exhibit C at ¶5.)

She is nervous about attending graduation because there has been much discussion at school about whether there will be a prayer at the ceremony. She doesn't think she should have to just try to ignore the prayer and does not want to have to leave ceremony because it makes her the center of attention and makes her feel left out. (Exhibit C at ¶6.)

Sean is subject to pressures of a different kind. As a teacher, he is required to attend the graduation ceremony. His relationships with teachers, staff, and the School Board are important to his personal well-being and professional success. His protest of a longstanding tradition of prayer may alienate fellow teachers or District personnel—potentially even the loss of his job. The inherently coercive environment generates great pressure for him to acquiesce in the District's practices.

4. *Endorsement*. The extraordinary degree of District involvement in prayer at a wide range of school activity sets this case apart from *Santa Fe*. There is no suggestion in *Santa Fe* that religious practice was pervasive at school sponsored events and remained so at the time that the policy was enacted, much less that prayers at such events were often delivered by District employees and Board members.

As is discussed above, the District says that it has no written policy on prayer or student messages at school events. Indeed, in early April, the District Administer informed an ACLU representative that the District had no policy whatsoever about these matters. (Letter from Johnny B. Holcomb to Dipak Patel 4/25/02, attached as Exhibit D.) Unknown to the ACLU, at the time, the District Supervisor obtained a letter from counsel advising the District to permit the graduating class to decide whether to have a message and, if so, to prepare the message on its own, without District interference. It is unclear whether the District intends to comply with this advice or not. (See attachment to Exhibit B.)[5]

In the circumstances of this case, however, whether the district adopts a facially neutral policy is immaterial. In *Santa Fe*, the Court made clear that its decision would

[5] Indeed, the District did not respond to an ACLU request for written assurances that it would not be implementing a student-led prayer at graduation. (Letter from Patel to Johnny Holcomb (5/3/2002), attached as Exhibit E.)

be the same even if the defendant's written policy were facially neutral:

> Even if the plain language of the [defendant's current] policy were facially neutral, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.

530 U.S. at 307 n. 21. Here, it would be plain that even a facially neutral policy would in all likelihood have a religious purpose in light of the defendants' history of noncompliance with constitutional standards; the pervasive religious culture at Plainview School, fostered in part by prayers given by the District Superintendent and Board members at school functions; defendants' decision to disregard the 2001 policy; and the reality, now clearly understood by graduating students, that the District will permit community pressure to undermine student choices.

Similarly immaterial is the absence of a written policy guiding the District's actions. In *Santa Fe*, the Court inferred endorsement in part from the text of the defendant's written policy. We have no text to work with here. But, the District's policy, as inferred from its practice, "plainly reveal[s] that its policy involves both perceived and actual endorsement of religion." *Santa Fe*, 530 U.S. at 305. The circumstances described in the brief speak even more compellingly of this District's endorsement of prayer than the text at issue in *Santa Fe.*

5. *Religious Purpose and Facial Challenges.* In *Santa Fe*, the defendant argued that plaintiffs' facial challenge was improper because "until a student actually delivers a solemnizing message under the [new] version of the policy, there can be no certainty that any of the statements will be religious." 530 U.S. at 313. The Court rejected the defendant's position:

> This argument. . . assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and that we guard against other different, yet equally important, constitutional injuries. *One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.*

Id. (Internal quotations and citations omitted). The Court went on to hold that it was immaterial if the policy resulted in a decision not to have prayer: "[E]ven if no Santa Fe High School student were ever to offer a religious message, the [new] policy fails a facial challenge because the attempt to encourage prayer is also at issue." 530 U.S. at 316.

In this context, the Court must determine whether the Plainview School policy has a religious purpose. This inquiry

> "not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clauses 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.

530 U.S. at 315. Accordingly, in finding a religious purpose, the *Santa Fe* Court relied on the totality of the facts pertaining to sponsorship, viewpoint discrimination, coercion, and endorsement. Each of those factors is well established by the evidence here. Therefore, in the circumstances of this case, the District's policies and practices must be enjoined.

One post *Santa Fe* opinion, *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2001), *cert. denied* (*Adler III)* seeks to impose additional constraints on facial challenges but in a context far removed from this case.[6] The *Adler III* court upheld a facially neutral policy permitting students to vote to give a message at graduation ceremonies without any school limitations or oversight of the message. As far as the three appellate *Adler* opinions reveal, there was no record of ongoing religious activities in the defendants' schools and there was some evidence that the policy had been applied even-handedly in the 17 graduation ceremonies held after its passage.

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[6] *Adler* has a checkered procedural history. Initially, even before the *Santa Fe* opinion, a three judge panel found the facially neutral policy at issue to violate the Establishment Clause. *Adler*, 112 F.3d 1475 (11th Cir. 1997 (*Adler I*). That decision was overturned *en banc*. *Adler*, 206 F.3d 1070 (11th Cir. 2000)(*AdlerII*).

The *Santa Fe* Court vacated *Adler II* and remanded it for reconsideration in light of *Santa Fe*. *Adler*, 250 F.3d 1330 (11th Cir. 2001) (*Adler III)*, cert. denied 2001. A divided *en banc* panel in *Adler III* reaffirmed its holding in *Adler II*.

Even if *Adler* were correctly decided, it is not controlling here. Among other distinctions:

- The record in *Adler* did not include the circumstances and "social facts" found so important in *Santa Fe*. Here, the social facts reveal a school whose activities are permeated with a long tradition of religious activity and school-sponsored prayer

- The defendant in *Adler* enacted its policy shortly after the *Lee* decision in a good faith effort to comply with the Supreme Court's holding that school could not permit a minister to deliver a graduation prayer. Here, the District disregarded *Lee* every year until Sean complained. The move to a student vote clearly had an impermissible religious purpose: to preserve the unbroken tradition of graduation prayer.

- The policy in *Adler* was viewpoint neutral on its face. In contrast, the policy employed by the District last year gave students only three choices for a message: prayer, a moment of silence, or no message at all. The District thus guaranteed that the only verbal message that could be delivered at graduation was a prayer, a result that clearly violates the principle of viewpoint neutrality.

- In *Adler,* a significant number of graduating classes chose not to have a religious message under the policy at issue and there was no record that the school attempted to override those student elections. In this case, the District permitted parental objections to override last year's policy and permitted and a second election in order to achieve the desired result: a prayer at last year's ceremony.

- It is possible that the District will modify the 2001 policy to comply with its attorney's April 30, 2002, opinion letter, which was drafted in the wake of inquiries from the ACLU. In light of the school's long history of minister-delivered prayer at graduation and last year's "student choice" subterfuge, any additional modifications must be seen as having the continuing (and impermissible) religious purpose of preserving the tradition of graduation prayer. *See Santa Fe,* 530 U.S. at 309 ("The history indicates the District intended to preserve the practice of prayer before football games.")

B. THE POLICY OF PRAYER AT TEACHER IN-SERVICE TRAINING SESSIONS VIOLATES THE ESTABLISHMENT CLAUSE

In addition to the annual graduation prayer, plaintiffs challenge the practice of prayer on school grounds at the teachers' annual in-service orientation—a prayer that last year was given by District Superintendent Holcomb. Each year, the District or ministers invited to attend the annual in-service training day delivers a prayer just before lunch. All teachers are required to attend, the training is organized and sponsored by the District, and the session is held in the school building. Last year, when Sean attended for the first time, the prayer was given by District Superintendent Holcomb.

Even in the context of a challenge to an opening prayer at the beginning of a school board meeting, which may be a closer case because it is somewhat similar to a legislative body where a nonsectarian opening prayer has been permitted[7], prayer has been held to violate the Establishment Clause. *Coles v. Cleveland Board of Education*, 171 F3d. 369 (6th Cir. 1999). This practice should be enjoined prior to the next such training session.

II. IRREPARABLE INJURY IS PRESUMED IN LIGHT OF DEFENDANTS' CONSTITUTIONAL VIOLATIONS EVEN IF THE DISTRICT VOLUNTARILY CEASES ITS UNLAWFUL POLICIES AND PRACTICES.

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[7] *See Marsh v. Chambers*, 463 U.S. 783 (1983) (permitting nonsectarian nonproselytizing prayer at opening of legislative session).

Where, as here, "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, § 2948.1 at 161 (2d ed. 1995). "'[T]o the extent that First Amendment rights are infringed, irreparable injury is presumed.'" *Community Communications Company, Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981). An infringement of Plaintiffs' First Amendment rights guaranteed by the Establishment Clause**,** even for minimal periods of time, constitute[s] irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

Indeed, it is appropriate in an Establishment Clause case to grant a temporary injunction even where the defendant voluntarily ceases the challenged practice. "The crucial test, in an action involving a request for injunctive or declaratory relief, where defendant has voluntarily ceased his allegedly illegal conduct, is whether it can be said with assurance that there is no reasonable expectation that the wrong will be repeated." *Doe v. Duncanville Independent School Dist.*, 994 F.2d 160, 166 (5th Cir. 1993).

III. THE THREATENED INJURY TO PLAINTIFFS OUTWEIGHS ANY HARM TO DEFENDANTS.

The threat of a constitutional injury to plaintiffs plainly outweighs any harm to defendants. The entry of temporary and preliminary injunctive relief will cause no constitutional or monetary injury to defendants whatsoever.

IV. THE INJUNCTION, IF ISSUED, WOULD NOT DISSERVE THE PUBLIC INTEREST.

The vindication of plaintiffs' constitutional rights in this case will serve the public interest.

CONCLUSION

The District's policy and practice of encouraging and delivering sectarian prayer at graduation ceremonies and teacher training sessions plainly violates the Establishment Clause. Plaintiffs are entitled to a temporary restraining order enjoining these policies and practices prior to the May 25 graduation ceremony and a preliminary injunction thereafter[8].

Respectfully submitted this ___ day of May, 2002.

James W. Hubbell
KELLY|HAGLUND|GARNSEY + KAHN LLC
1441 18th Street, Suite 300
Denver, CO 80202
Telephone: 303-296-9412

[8] In the present case, this Court should waive the requirement of a bond because defendants are unlikely to suffer any harm *International Controls Corp. v. Vesco,* 490 F.2d 1334, 1356 (2d Cir. 1974), and because of the strong likelihood of success on the merits *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972).

Mark Silverstein, Legal Director
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
400 Corona Street
Denver, CO 80218
Telephone: 303-777-5482

ATTORNEYS FOR THE PLAINTIFFS

IN COOPERATION WITH THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO