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Legal Memorandum on Graduation Prayers in Public Schools

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The United States Supreme Court has never ruled that prayer or religious messages are completely banned during public school graduation ceremonies. The key to graduation prayer is that the school should remain neutral – neither commanding that prayer or religious messages be given, nor prohibiting voluntary prayer or religious messages. The school must not censor prayer or religious content from the graduation podium.

What Is Prohibited?

The Court's decision in *Lee v. Weisman*[1] has caused some confusion as to whether prayers are permissible at graduation. To understand what is prohibited by the United States Supreme Court decision in *Lee v. Weisman*, it is important to know some of the history regarding the case. The Supreme Court's decision focused on the following three factors: (1) the school principal decided that an invocation and benediction would be given at the ceremony and placed prayer on the agenda; (2) the principal chose the religious participant; and (3) the principal provided the clergyman with a copy of *Guidelines for Civic Occasions*, produced by the National Council of Christians and Jews, outlining suggestions for delivering nonsectarian prayers. The Court found that these three factors placed the school in the position of guiding and directing the content of the prayer during a public ceremony.

What the Supreme Court prohibited can be summarized as follows: School officials cannot direct that prayer be part of a public school graduation ceremony, select a religious participant for the express purpose of delivering a prayer, and give guidelines on how to say a nonsectarian, nonproselytizing prayer. In practical terms, a public school cannot invite a clergyman to say a prayer at a graduation ceremony *and* direct the content or manner of the prayer. As an additional note, the *Lee* decision does not affect graduation prayers at post-secondary schools, that is, the college or university level.[2]

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[1] 505 U.S. 577 (1992).

[2] *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), *cert. denied,* 522 U.S. 814 (1997) (university students are mature enough to understand that a prayer delivered by a clergy at a state university graduation ceremony is not an establishment of religion); *see also Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied,* 523 U.S. 1024 (1998).

The Supreme Court did not ban all prayers at graduation. In fact, the Court stated that its ruling was limited to the facts of that particular case.[3] Therefore, any change in the factual situation presented in *Lee* might change the outcome. Justice Scalia wrote in his dissenting opinion that merely adding a disclaimer to the graduation program would make the same set of facts constitutional.[4] Justice Scalia stated:

> All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.[5]

Obviously the United States Supreme Court has not taken the position that all graduation prayer is unconstitutional. Indeed, the Court noted the following:

> We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.[6]

The Supreme Court recognized that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[7] The Court in *Lee v. Weisman* was concerned that school officials were actively involved in placing prayer on the agenda, inviting a religious clergyman to speak for the purpose of prayer, and giving the clergyman specific guidelines for saying nonsectarian prayers. Prayer can still be conducted at public school graduations if school officials use secular criteria to invite the speaker, and once there, the speaker voluntarily prays. A valedictorian, salutatorian, or class officer can also voluntarily pray as part of the ceremony. The student body can elect a class chaplain or elect a class representative for the specific purpose of prayer. Part of the school program can be given over to the students and therefore be student-led and student-initiated. A parent and/or student committee can create and conduct part of the ceremony and, therefore, avoid state involvement. The ceremony can be conducted off the school premises by private individuals, and therefore no state involvement would occur. The school may also adopt a free

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[3] *Lee*, 505 U.S. at 587.

[4] *Id.* at 645 (Scalia, J., dissenting).

[5] *Id.*

[6] *Id.* at 598-99.

[7] *Id.*

speech policy which allows the senior class an opportunity to devote a few minutes of the ceremony to uncensored student speech that can be secular or sacred. Finally, private individuals can sponsor public school graduations on or off the public campus.

What Is Permitted?

Prayer is still permissible during public school graduation. Post-secondary schools (colleges and universities) may continue to invite clergy to deliver a prayer at graduation. While secondary schools (middle, junior high and high school) face more restrictions than post-secondary schools, they still retain several options for the continuation of prayer. The restrictions on prayer during graduation at a public secondary school do not apply at the post-secondary level.[8] Courts have reasoned that students in post-secondary schools are less impressionable, more mature, and can better understand that the prayer offered by a student or an outside clergy does not necessarily represent the school, thus removing some of the restrictions secondary schools maintain.

In 2000 the Supreme Court struck down an athletic event prayer policy in which public school officials controlled the content of the message and thus assured that the message would always include prayer.[9] However, the Court was quick to acknowledge that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day."[10] The Court also noted that the First Amendment does not "impose a prohibition on all religious activity in our public schools."[11] Once the specific facts of this case are considered, the principle is clear: a policy or practice whereby the government remains neutral by allowing a message of the speaker's choice, including a religious message, is constitutional.

The *Santa Fe* case involved four separate school board policies. The first policy dealt with graduation prayer. The senior class could vote on whether to include a "nonsectarian" and "nonproselytizing" invocation and benediction as part of graduation. If the class voted to do so, two seniors were elected by the class to deliver the prayers. A second policy eliminated the requirement that the prayers be "nonsectarian" and "nonproselytizing." A third policy dealt specifically with invocations at football games and was patterned after the graduation policies, except that the student chosen to deliver the invocation would be the same student for each and every home game. The final football game prayer policy omitted the word "prayer" and replaced it with the words "messages," "statements," and "invocations." However, the person chosen to deliver the invocation "message" was the same person selected under the prior "prayer only" policy.

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[8] *Tanford*, 104 F.3d at 982; *Chaudhuri v. Tennessee*, 886 F. Supp. 1374 (M.D. Tenn. 1995) *cert. denied,* 522 U.S. 814 (1997).

[9] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

[10] *Id.* at 313.

[11] *Id.*

Under the *Santa Fe* policies, the only "message" which a chosen student could deliver was prayer. If the students voted against an invocation, then no message was permitted. If the students voted in favor of an invocation, then the policy required that the content of the message include only prayer. Thus, the school policy predetermined the content of the message. The Court was not concerned with the fact that the policy granted only one student access to the stage at a time.[12] The Court suggested that students may speak on religious topics during school-sponsored events so long as their message is not controlled and directed by school officials.[13]

Option One
Student Messages

Following the Supreme Court's 1992 decision in *Lee v. Weisman*, some school districts reacted by adopting "prayer only" policies for student speakers.[14] Some federal courts have upheld such policies while others have not.[15] However, based on the Supreme Court decision in

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[12]*Id.* at 304.

[13]*Id*. at 302-04, 313. *See also Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert denied*, 531 U.S. 801 (2002).

[14]The first case involving a "prayer only" policy for students is *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). The Supreme Court handed down the decision in *Lee v. Weisman* on June 24, 1992, and the *Jones* decision was rendered on November 24, 1992. The High Court refused to hear the *Jones* appeal on June 7, 1993. Thus, it appeared that the Supreme Court would uphold a "prayer only" policy so long as the messenger was a student. However, the Court's 2000 decision in *Santa Fe* now indicates that "prayer only" policies may also be called into question. Note that the Fifth Circuit Court of Appeals has since reaffirmed the *Jones* decision. *See Ingebretsen*, 88 F.3d at 274. The next case dealing with student prayers is *Harris v. Joint School District No. 241*, 821 F. Supp. 638 (D. Idaho 1993), *modified*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995). However, the Supreme Court set aside the ruling because the students had graduated, and the case became moot. Later, the same Ninth Circuit Court of Appeals upheld a policy which allowed the top four academic students to deliver an uncensored "message" of the student's choice. *See Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc). The same court then set aside this ruling on the basis that the case had become moot due to graduation. The next time the Ninth Circuit considered a graduation prayer case was in *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000). In *Cole*, the court ruled against a student who sought to force the school to allow him to pray at graduation. The next case was *Adler v. Duval County School Board,* 851 F. Supp. 446 (M.D. Fla 1994), *aff'd in part and vacated in part,* 112 F.3d 1475 (11th Cir. 1997), *reh'g denied*, 120 F.3d 276 (11th Cir. 1997). This court in *Adler* upheld a student "message" policy, but when the ACLU appealed the matter, the appeals court vacated the case because of mootness due to the fact the students had already graduated. Note that Karen Adler was the student in the 1994 *Adler* case. Her younger sister, Emily, later re-filed the same case in 1998. This later series of rulings upheld the "message" policy and will be further addressed below. In *ACLU v. Black Horse Pike Regional Board of Education*., 84 F.3d 1471 (3d Cir. 1996) (en banc), the court struck down a "prayer only" policy. The most well-reasoned cases which upheld student prayers at graduation include *Adler*, 250 F.3rd at 1330, *Chandler v. James*, 180 F.3d at 1254, and *Chandler v. Siegelman*, 230 F.3d at 1313. These cases will be further discussed below.

[15]As noted above, the Fifth Circuit Court of Appeals has upheld a student "prayer only" policy provided that the prayer is nonsectarian and nonproselytizing. The Fifth Circuit covers the states of Texas, Louisiana and Mississippi. The Third and Ninth Circuits have ruled against such policies. The Third Circuit governs Pennsylvania, Delaware, New Jersey, and the Virgin Islands. The Ninth Circuit governs California, Washington, Oregon, Nevada, Arizona, Idaho, Montana, Hawaii, Alaska and Guam.

Santa Fe regarding prayers during athletic events, it appears that the Court would strike down a "prayer only" policy. Instead, a policy which allows students to select a message of choice without input, direction or censorship from school officials meets every concern expressed by the High Court. Such a policy was at issue in the case of *Adler v. Duval County School Board.*[16] The full policy states as follows:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class.

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole.

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by school officials, its officers, or employees.[17]

During the first year in which the above policy was operative within the school district, ten of the seventeen high schools opted for messages that constituted various forms of religious prayer. The remaining seven schools had either no message at all or their message was entirely secular in nature.[18] The policy allowed the senior class to vote on whether to include an opening and/or closing student "message" at graduation. If the students voted to include a message, then the senior class elected a student to deliver the message, the content of which was entirely the student's decision. Under this policy, students could deliver a secular or religious message or no message at all. School officials were prohibited from directing, reviewing or censoring the

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[16]250 F.3d 1330 (11th Cir. 2001), *cert. denied*, 534 U.S. 1065 (2001). This case began in 1994 when Karen Adler challenged a school policy allowing students to deliver uncensored messages at graduation. Liberty Counsel intervened and defended the school policy. The court upheld the policy. *See Adler*, 851 F. Supp. at 446. She appealed the case, and it was argued twice (1995 and 1996) before the Eleventh Circuit Court of Appeals. In 1997, the court dismissed the case as moot because Karen Adler had already graduated. *See Adler*, 112 F.3d at 1475. In 1998, her younger sister, Emily, filed the identical suit against the policy. Again, the court upheld the policy, and the case was appealed. *See Adler v. Duval County Sch. Bd.,* 174 F.3d 1236 (11th Cir. 1999). This time the court ruled in a 2-to-1 decision against the policy. Liberty Counsel immediately asked the full panel of judges to hear the case and set aside the ruling. Three weeks after the ruling, the full panel of 12 judges set aside the ruling and agreed to rehear the case. After arguing the case before the 12 judges, the court on March 15, 2002 ruled 10-2 in favor of the policy. *See Adler v. Duval County Sch. Bd.,* 206 F.3d 1070 (11th Cir. 2000) (en banc). Then on June 19, 2000, the Supreme Court handed down the *Santa Fe* case involving prayers at football games. *See Santa Fe*, 530 U.S. at 290. The ACLU appealed the *Adler* case, and the High Court, while not ruling on the case, vacated the opinion and sent the case back down to the Eleventh Circuit to consider whether *Santa Fe* affected its decision. *See Adler*, 531 U.S. at 801. On May 11, 2001, the Eleventh Circuit issued its opinion in an 8-4 ruling again upholding the policy, stating that the Santa Fe decision did not change the outcome. *See Adler*, 250 F.3d at 1330. The ACLU appealed the case one more time, arguing the *Santa Fe* decision meant that all prayers by students at school sponsored event were unconstitutional. On December 10, 2001, the Supreme Court refused to hear the case and thus allowed the decision upholding the message policy to stand. *See Adler*, 534 U.S. at 1065.

[17]*Adler*, 250 F.3d at 1332.

[18]*Id.* at 1339.

message. The *Adler* Court observed the following about the school policy:

> The Duval County policy, unlike the Santa Fe policy, does not subject the issue of prayer to an up-or-down vote; students do *not* vote on whether prayer, or its equivalent, should be included in graduation ceremonies. Rather, students vote on two questions that do not expressly or inherently concern prayer: (1) whether to permit a student "message" during the ceremony, and (2) if so, which student is to deliver the message. . . .
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> Although it is possible that under Duval County's policy the student body may select a speaker who then chooses *on his or her own* to deliver a religious message, that result is not preordained, and more to the point would not reflect a "majority" vote to impose religion on unwilling listeners. Rather, it would reflect the uncensored and wholly unreviewable decision of a single student speaker.[19]

Commenting on school policies that provide prayer as the only option, one federal court observed the following:

> When the State *commands* religious speech, it steps over the Constitution to establish religion. In each of these cases, it is the *State's decision to create an exclusively religious medium* which violates the Establishment Clause; not the private parties' religious speech. It is not the "permitting" of religious speech which dooms these policies, but rather the *requirement* that the speech be religious, i.e., invocations, benedictions, or prayers.[20]

Since "genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution."[21] The same court also observed that the "Constitution does not require a complete separation of church and state such that religious expression may not be tolerated in our public institutions."[22] "If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so."[23] The court noted that

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[19] *Id.* at 1338-39.

[20] *Chandler*, 180 F.3d at 1259. This case was decided on July 13, 1999. (During the appeal, the U.S. Supreme Court handed down the *Santa Fe* football game prayer case.) In light of this case, the High Court vacated the *Chandler* decision and sent it back to the Eleventh Circuit Court of Appeal to consider whether the *Santa Fe* ruling affected the outcome of *Chandler*. The appeals court considered *Santa Fe* and issued another ruling reinstating the Chandler decision, stating that nothing in *Santa Fe* changed the outcome. *See Chandler*, 230 F.3d at 1313. The case was again appealed, but this time the Supreme Court refused to hear the case and allowed the decision to stand.

[21] *Id*. at 1261.

[22] *Id*. at 1262.

[23] *Id.* at 1264.

the school should remain neutral in matters of religion, neither commanding, nor suppressing, but instead permitting religious expression.[24]

A school policy which allows students to deliver a message of choice, neither commanded nor censored by school officials, maintains government neutrality toward religion. In this way the student message is truly private speech, even though it occurs at a school-sponsored event. The resulting message is only that of the students and cannot be attributed to the school. Such a policy is constitutional. "So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected."[25]

Option Two
Students Selected By Religion-Neutral Criteria

Similar to option one, another option includes a valedictorian, salutatorian, president of the senior class, or any other student participant chosen, based on academic criteria or other secular standards, to be a part of the graduation ceremony. When addressing the senior class, this person could voluntarily offer a prayer or religious message. In this circumstance, the school would not place prayer on the agenda and would not select the student for the specific purpose of prayer. The school may not even know that the participant desired to pray until the participant stood up and prayed. Again, under this particular option, if the school prohibited this student participant from praying, it would violate the First Amendment Free Speech and Establishment Clauses because the school would be restricting speech based on the viewpoint of the message and showing hostility toward religion.

The Madison School District in Rexburg, Idaho, had a policy which allowed a minimum of four students selected by virtue of having the highest academic standing to deliver a message of their choice at graduation.[26] Students accepting the invitation to speak could deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement."[27] School officials were not permitted to "censor any presentation or require any content." Since these students were selected using neutral criteria and were free to address any subject without censorship or influence, the policy was upheld by the court.[28]

In one case, Liberty Counsel was contacted by a high school senior class president who was chosen to be the keynote speaker at graduation. The class president wanted to thank God in his speech. When he spoke to the principal, he was warned not to mention anything regarding religion. Liberty Counsel advised the student that he had the right to speak about his relationship with Jesus Christ. He was rightfully there on the platform by virtue of his position as a class

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[24] *Id.* at 1261, 1264.

[25] *Chandler*, 230 F.3d at 1317.

[26] *See Doe v. Madison Sch. Dist. No. 321*, 147 F.3d at 832.

[27] *Id.* at 834.

[28] The decision was later vacated because the students who challenged the policy graduated, and the case became moot on appeal. However, the substantive reasoning of the case was not disturbed.

officer, and while there, he had the right to speak freely so long as he did not speak libelous or defamatory remarks toward other students. When he spoke during the graduation ceremony, he acknowledged and thanked God for his accomplishments. At the end of the speech, he received a standing ovation. Afterwards, he received numerous cards from students and parents congratulating him for having the courage to speak about God. The response was so overwhelming that even the principal wrote the student a thank-you card.

In another school, the valedictorian sneezed after giving the valedictory address. The students responded in unison, "God bless you." Although this is a humorous way of acknowledging God during a ceremony, the Constitution does not require students to resort to such tactics in order to acknowledge God. When student speakers enter the podium during a graduation ceremony, they do not shed their constitutional rights to freedom of expression, just like they do not shed this right when they enter the schoolhouse gate.[29]

Option Three
Outside Speaker Selected By Religion-Neutral Criteria

If a school does not place "prayer" on the agenda and does not select a clergy for the sole purpose of delivering a prayer, it avoids two of the Supreme Court's major concerns. School officials can use neutral criteria for selecting the participants. A neutral criteria is one that does not select a speaker for the sole purpose of delivering a religious message. If a school chose a speaker because of some contribution the speaker made to society and not only because the speaker is a clergy, then the school may avoid one of the concerns of the Supreme Court. In short, school officials could choose a speaker or participant because of some recognized contribution to society. A clergyman could be a participant as long as the selection was made using neutral criteria and not solely because the participant will deliver a religious message.

An individual selected using neutral criteria could then participate in the public graduation ceremony and voluntarily offer a prayer or make religious comments. In this way, the school does not intentionally select a religious person for the purpose of prayer. For the school to forbid this participant from saying a prayer may violate that person's First Amendment right to free expression. Furthermore, if a school prohibits such a person from saying a prayer, the school may also violate the First Amendment Establishment Clause for demonstrating hostility, rather than neutrality, toward religion. In summary, a school may select a participant using neutral or secular criteria and that participant could voluntarily pray or offer religious comments.

Option Four
Privately Sponsored Graduation

Under the above options, prayer can still be conducted during public school graduation ceremonies. There may be some years when prayer is conducted and other years when the speaker may choose not to pray. In order to insure that prayer is conducted on a consistent basis, community leaders and churches may privately sponsor graduation ceremonies. Many schools are not large enough to hold public graduation ceremonies. Such schools often use outside

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[29] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

facilities, and many use church auditoriums. Churches throughout the community can organize public graduation ceremonies or baccalaureate services. The time, place, and manner could be organized by the churches or other community leaders, and student groups could publicize the event through their on-campus clubs. Public school students, along with teachers and staff, could be invited to participate in the ceremony designed and choreographed by private individuals.

School officials could participate in ceremonies conducted at churches as long as the school is not sponsoring the event. At such a service, there would be no prohibition against inviting a religious speaker to address the students.

If a public school allows use of its facilities by outside secular organizations, then the school must allow use of the same facilities by religious organizations for religious meetings.[30] Such a purpose can be the performance of a graduation or baccalaureate ceremony. In one case, a United Methodist Church sued a school board because it wished to rent the facilities for a graduation ceremony. The school refused, and an Alabama federal court ruled that disallowing use of the facilities by the Methodist church was a violation of the First Amendment Free Speech Clause, because the school allowed use of its facilities to other outside secular organizations.[31] Indeed, the United States Supreme Court stated that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality, but hostility toward religion.[32] In another case, a group of parents and graduating senior students requested use of a high school gymnasium to conduct a baccalaureate ceremony. The baccalaureate ceremony was privately-sponsored and open to the public. Participation by the students was completely voluntary. However, the school board decided not to rent the gymnasium because its use would be for a religious purpose. The school board had on other occasions allowed use of its facilities to outside secular organizations. A federal court in Wyoming ruled that refusal to rent the gymnasium to the parents and students to conduct the religious baccalaureate service was an unconstitutional violation of the First Amendment.[33] Thus, private persons or groups may organize a graduation or baccalaureate ceremony, and the event may be held off campus in a private facility or on the school campus if the school allows the community to use its facilities for secular meetings. Public employees can also participate on their own time in these privately sponsored events.

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[30] *See Good News Clubs v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001).

[31] *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991).

[32] *Mergens*, 496 U.S. at 248; *see also Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir. 1990), *cert. denied*, 498 U.S. 899 (1993); *Concerned Women for Am. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1990).

[33] *Shumway v. Albany County Sch. Dist. #1*, 826 F. Supp. 1320 (D. Wyo. 1993); In *Pratt v. Arizona Board of Regents*, 520 P.2d 514 (Ariz. 1974), the Arizona Supreme Court ruled that the rental of the Sun Devils Stadium on a university campus to an evangelist for a religious service did not violate the First Amendment Establishment Clause.