6510 Library

STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

May 14, 1998

The Honorable Larry K. Grooms
Senator, District No. 37
504 Gressette Building
Columbia, South Carolina 29202

Dear Senator Grooms:

You have sought an opinion concerning several proposed amendments to the State Constitution through binding referenda which you are contemplating. You wish to know whether these constitutional amendments would pass muster under the federal Constitution. Specifically, you wish to know whether a state constitutional amendment requiring a "moment of silence" in all South Carolina schools is valid under the federal Establishment Clause; further, whether a school voucher system authorized by the State Constitution would be constitutionally permissible under the First Amendment; and finally whether an amendment to Article XII, § 2 of the South Carolina Constitution, removing the requirement of "rehabilitation" of inmates and replacing it with a requirement of all able-bodied inmates to work is valid under the federal Constitution. It is my opinion that each of these amendments to the State Constitution would be consistent with the federal Constitution.

Law / Analysis

With respect to the "moment of silence" issue, this Office has previously advised that such a requirement is constitutionally valid if it meets the three-pronged test of Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See Op. Atty. Gen., Op. No. 88-33 (April 11, 1988). The statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and the statute must not foster "an excessive government entanglement with religion." Our 1988 Opinion referenced the United States Supreme Court decision of Wallace v. Jaffre, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), which had

(803) 734-3970 (803) 734-3646 Facsimile

Request Letter

found Alabama's "moment of silence" provision constitutionally wanting because the Court concluded that it had no clearly secular purpose and was motivated by a purpose to advance religion. Applying Jaffre, this Office found that "so long as the facts do not demonstrate a religious rather than a secular purpose," the requirement of a "moment of silence" would "likely be upheld by a court." See also, Wallace, 472 U.S. at 78 (O'Connor, concurring) ["By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period."].

With respect to the proposed state constitutional amendment to Art. XII, § 2, thereby removing the right to "rehabilitation" and replacing it with a requirement that all able-bodied inmates shall be required to work, likewise, there is no federal constitutional bar to such a change. In McLamore v. State, 257 S.C. 413, 186 S.E.2d 250 (1972), our Supreme Court concluded that requiring inmates to work does not constitute cruel and unusual punishment. The Court, quoting other authorities stated that "'... punishment by imprisonment at hard labor is not of itself cruel and unusual within the meaning of the constitutional ban on such punishments.'" 186 S.E.2d at 254. In Wendt v. Lynaugh, 841 F.2d 619 (5th Cir. 1988), the Court held that requiring an inmate to work without pay violated neither the Eighth Amendment nor the Thirteenth. Nor does the federal Constitution give a prisoner a constitutional right to rehabilitation while in prison. It is well-recognized that "[m]any courts have held that prisoners have no constitutional right to various rehabilitative programs including drug treatment, employment, or other rehabilitation, education or training programs while in prison." McFadden v. Lehman, 968 F.Supp. 1001, 1003 (M. D. Pa. 1997) [referencing numerous cases]. Thus, so long as the State complies with minimum federal constitutional requirements such as exist, for example, under the Eighth and Fourteenth Amendment in other contexts (e.g. food, medical treatment, etc.), it has no further obligation to "rehabilitate" prisoners and can clearly mandate that all inmates who are able to do so, must work.

Finally, you ask whether a system of school vouchers, if required by the State Constitution, would be consistent with the Establishment Clause of the First Amendment. Currently, Art. XI, § 4 provides that "[n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." See also, Art. XI, § 3 [General Assembly shall provide for the maintenance and support of a system of free public schools]; Art. X, § 11 [credit of State or its political subdivisions not to be pledged or loaned for the benefit of private associations or corporations]; Art. I, § 2 [no establishment of religion].

Again, the Lemon v. Kurtzman three-pronged test provides the guideposts for any analysis of a school voucher program. The First Amendment issue raised by vouchers

would clearly be whether providing financial assistance through vouchers to students who chose to attend sectarian schools would pass constitutional muster under the Lemon test. Recently, the Attorney General of Virginia concluded that a school voucher program might well be upheld under Lemon. There, the Attorney General, in 1994 Va. Op. Atty. Gen. 21 (January 10, 1994), wrote:

> [a]pplying these three "Lemon criteria," the Supreme Court of the United States generally has upheld governmental grant programs that benefit religion only indirectly and incidentally, in pursuit of legitimate nonsectarian policies, and avoid undue governmental entanglement in religious affairs. ... For example, in Mueller v. Allen [463 U.S. 388 (1983) ... the Supreme Court of the United States upheld a state statute that allowed state income taxpayers to deduct expenses for tuition, text books and transportation incurred in sending their children either to public schools or to private nonsectarian or sectarian schools. Id. at 395-402. The Court also decided that the state's involvement in this program through governmental audits of claimed deductions, and the resulting disallowance of deductions for textbooks used to teach religious doctrines did not constitute "excessive entanglement" with religion. Id. at 403.
>
> You have not detailed any specific proposal for a voucher program, and the decision of the federal courts undoubtedly would depend on such specific details. Existing United States Supreme Court decisions suggest, however, that a tuition voucher program that generally benefits all students, including those attending sectarian schools, might withstand a federal constitutional challenge if it were tailored to fit the Lemon criteria and thus be consistent with the establishment clause of the First Amendment.

A number of constitutional scholars, such as Professor Jesse Choper, have also predicted that school vouchers will be upheld by the Supreme Court. Professor Choper has stated that

> [t]here is no hornet's nest -- despite the U.S. Supreme Court's Lemon test, which suggests there's a powerful argument for unconstitutionality. Under the Lemon test, government action

> violates the establishment clause if it is intended to further a religious purpose, has the effect of furthering a religious purpose or impermissibly entangles the government with religion.
>
> But the court does not take that test seriously. A 1986 case, Witters v. Washington Department of Services for the Blind (106 S.Ct. 748), made it clear -- at least to me -- that a voucher system would pass muster under the establishment clause.

Reuben, "Are School Voucher Plans Constitutional?", 13-Oct Cal. Law. 35 (October 1993). Likewise, citing Witters v. Washington Dept. of Services for the Blind, a Note in the Georgetown Law Review concluded that school vouchers would be upheld by the present United States Supreme Court. The Note found that "[t]he current Court would find that tuition vouchers, the plan's means of providing school choice to parents and their children, (1) have a secular legislative purpose, (2) do not have as their principal or primary effect the advancement of religion, and (3) do not foster an excessive entanglement of religion." Futterman, "School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools," 81 Geo. L. J., 711, 725 (March 1993). In Witters, the Court upheld Washington's grant of financial vocational assistance to a blind seminary student. The Court concluded that such aid "ultimately flow[ed] to [the] religious institution ... only as a result of the genuinely independent and private choic[e] of Witters."

Further support for the fact that school vouchers would likely be upheld is found in the recent Supreme Court case of Agostini v. Felton, ___ U.S. ___, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). There, the Court validated the program where New York City sent public school teachers into parochial schools to provide remedial education to disadvantaged children. The Court, speaking through Justice O'Connor, found no incentive to undertake religious education "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." Following Agostini, Witters and other recent cases, a constitutional scholar has written that state neutrality is preserved in a school voucher program in two separate ways. First, the law authorizing the program must be neutral on its face. The standard evolving in cases such as Agostini appears to be moving toward a definition of neutrality "that is concerned only with whether the benefits are distributed on a religiously neutral basis." Adams, "Cleveland, School Choice and Laws Respecting an Establishment of Religion," 2 Tex. Rev. of Law and Politics 165, 185 (Fall 1997). Second,

> ... any benefit received by the religious schools participating in the program arrives only as the result of the independent and private choices of the parents with children in the program. This fact disrupts any nexus between the State and the participating religious schools, and the State cannot be seen as aiding religion. Indeed, to exclude the religious schools from this otherwise neutral program would inhibit religion.

Id.

Conclusion

In conclusion, it is our opinion that the proposed moment of silence, requirement of prisoners to work and school vouchers are all valid under the federal Constitution. The General Assembly can, consistent with the federal Constitution, give the people the right to vote on whether all school children can have a moment of silence in the schools, all prisoners in our penal institutions, consistent with public safety, must work and every parent can have the choice as to where to send their children to school.

Sincerely,

Charles M. Condon
Attorney General

CMC/an