

The State of South Carolina



Opinion No 8833

Pg 187

Attorney General
T. TRAVIS MEDLOCK

Attorney General
Columbia

April 11, 1988

The Honorable Addison G. Wilson
Member, South Carolina Senate
606 Gressette Building
Columbia, South Carolina 29202

Dear Joe:

You have requested the advice of this Office as to whether proposed Senate Bill S-660 would be constitutional. The Bill contains the following provisions:

* * *

(1) that the public school day is filled with hectic activity and demanding challenges for students and teachers;...

(2) that it is appropriate at the beginning of the school day to observe one minute, free of the multiple distractions that intrude on the educational process during which students and teachers can contemplate the challenges of the upcoming day and assume a frame of mind that promotes the proper atmosphere for learning and teaching.

* * *

I assume that your question concerning the constitutionality of this Bill is directed to whether it would violate restrictions in the First Amendment of the United States Constitution on the establishment of religion.

Although numerous cases have addressed laws concerning school prayer, decisions concerning laws providing only for moments of silence are limited. Of guidance is a U.S. Supreme Court case concerning an Alabama statute that authorized a period of silence "for meditation or voluntary prayer." Wallace v. Jaffree, 472 U.S.

Honorable Addison G. Wilson
Page 2
April 11, 1988

38, 86 L.Ed. 2d 29, 105 S.Ct. 2479 (1985). In that case, the Court applied the following three prong test of Lemon v. Kurtzman, 403 U.S. 602, 612-613, 29 L.Ed. 2d 745, 91 S.Ct. 2105 (1971):

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. Board of Education v. Allen, 392 U.S. 236, 243 20 L.Ed. 2d 1060, 88 S.Ct. 1923 (1968); finally, the statute must not foster "an excessive government entanglement with religion." Walz [v. Tax Comm'n.], 397 U.S. 664, 674, 25 L.Ed. 2d 697, 90 S.Ct. 1409, 1414 (1970)].

The Court found the Alabama statute to be unconstitutional under the first of these criteria because the Court concluded that it had no clearly secular purpose and was motivated by a purpose to advance religion. Wallace based its conclusion upon such evidence of legislative intent as a statement inserted into the legislative record which indicated that the legislation was an "effort to return voluntary prayer" to the public schools. 86 L.Ed. 2d at 43. In addition, the Court noted that another Alabama statute, not appealed to the Supreme Court, already provided for a moment of silence during which students were not prevented from engaging in voluntary prayer. Wallace concluded that the addition of "or voluntary prayer" to the statute in question was for the sole purpose of expressing the state's endorsement of prayer activities which the Court found to be inconsistent with the principle that the government must pursue a course of neutrality toward religion.

Unlike the Alabama statute found to be unconstitutional in Wallace, S-660 contains no reference to prayer. Although Wallace did not expressly address the constitutionality of a statute providing only for a minute of silence without reference to prayer, the Court did hint that such a statute might be found to be constitutional in noting that "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." 86 L.Ed. 2d at 45. Although not a binding decision, the concurring opinion of Justice O'Connor noted that scholars and at least one member of the Supreme Court had previously suggested that a moment of silence in public schools would be constitutional. She stated that "[b]y mandating a moment of silence, a state does not necessar-

Honorable Addison G. Wilson
Page 3
April 11, 1988

ily endorse any activity that might occur during the period...."
86 L.Ed. 2d at 55.

Here, because the face of S-660 indicates a clearly secular purpose, the Bill should pass the purpose prong of the Lemon test under the above authority unless some evidence of legislative intent contrary to that purpose is admitted into evidence by a court and found to be persuasive on the issue of purpose. Although Wallace did not address the other prongs of the Lemon test, which are whether the statute would advance or inhibit religion or foster excessive governmental entanglement with religion, in his concurring opinion in Wallace, Justice Powell stated that those problems were not likely to occur with a "straightforward moment of silence statute." 86 L.Ed. 2d at 50. While Justice O'Connor noted the possibility that a moment of silence statute, "...as actually implemented could effectively favor the child who prays over the child who does not," she said that such questions "...cannot be answered in the abstract, but instead [require] courts to examine the history, language and administration of a particular statute to determine whether it operates as an endorsement of religion." 86 L.Ed. 2d at 54, 55. Here, factual questions as to administration of the statute in particular classrooms concern hypothetical factual matters that have not yet occurred as to S-660 because it has not yet been adopted by the Legislature.

Although S-660 appears to be facially valid, the Third Circuit Court of Appeals looked to other evidence to find invalid a New Jersey moment of silence statute that contained no reference to prayer. May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985); app. dis. 56 U.S.L.W. 4022. ^{1/} The New Jersey statute provided that principals and teachers "...shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student...for quiet and private contemplation or introspection." 780 F.2d at 245. The Court recognized that, "in the abstract", a statute similar to the New Jersey statute would not be deemed invalid by the Supreme Court under the purpose prong of the Lemon, but the Court found that the statute was not before it in the abstract. 780 F.2d at 251. May upheld the District Court's finding that "...the statute, although facially neutral, had a religious and not a secular purpose." Id. The Court noted that

^{1/} The appeal was dismissed for jurisdictional reasons, and the merits of the case were not addressed. 56 U.S.L.W. 4022.

Honorable Addison G. Wilson
Page 4
April 11, 1988

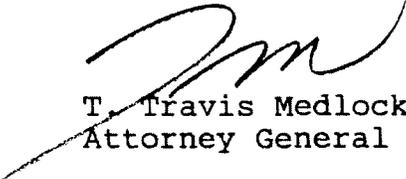
the District Court had relied "...heavily upon evidence suggesting that the silent minute has no legitimate pedagogical value" and that the "...tendered secular purpose - to provide a transition from non-school life to school life - was... pretextual..." Id. The specific purpose was found to be the provision of a time for prayer for those who wanted to pray. That purpose was held to be impermissible even though the Court concluded that the legislation did not have the purpose of endorsing prayer in preference to other forms of silent activity.

Because the Supreme Court dismissed May on a jurisdictional issue [see note 1, supra], we cannot be certain of whether it would have agreed with the Third Circuit's conclusion on the constitutional issue; however, the majority opinion and that of Justice O'Connor in Wallace recognized that a Court can look beyond the face of a statute to determine its purpose as did the Court in May. The majority in Wallace even relied, in part, upon testimony as to the legislative purpose. Although S-660 is helped by the deference given by the Courts to "...a state's articulation of a secular purpose..." such as the secular purpose set forth in S-660, nevertheless, the Court clearly can look to other contrary evidence of purpose. Edwards v. Aguillard, 482 U.S. ____, 96 L.Ed. 2d 510, 521, 107 S.Ct. ____ (1987). Therefore, even though S-660 appears to be valid upon its face, if other evidence were presented that the Bill's purpose was religious rather than secular, a court could find it to be unconstitutional under the First Amendment.

CONCLUSION

S-660 appears to be valid upon its face under the First Amendment of the United States Constitution. If the Bill is enacted, so long as the facts do not demonstrate a religious rather than a secular purpose, the Bill would likely be upheld by a court. The Bill facially, also appears likely to pass the "primary effect" and "entanglement" tests set forth above, absent the presentation of contrary evidence to a court.

Yours very truly,



T. Travis Medlock
Attorney General

TIM:st