

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 12, 2000

Elizabeth Alston, Chairman
Charleston County School District
75 Calhoun Street
Charleston, South Carolina 29401

Dear Ms. Alston:

You have asked whether an opening prayer to start the meetings of the Charleston County School Board is constitutional under the First Amendment's Establishment Clause. It is my opinion that a prayer to begin the meeting of the School Board is constitutional.

Law / Analysis

In Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the United States Supreme Court ruled that the practice of the Nebraska legislature opening each session with a prayer by a chaplain paid with public funds does not violate the Establishment Clause of the First Amendment. The Court referenced the fact that the sessions of deliberative bodies had traditionally opened with a prayer. Said the Court,

[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

Id. at 785. Further elaborating, the Court found:

[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative

sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).

The Court also rejected any argument that Nebraska's use of the same clergyman of the same denomination over a long period of time infringed the Establishment Clause. Likewise, said the Court, the fact that the chaplain was paid with public funds did not alter the conclusion that the Establishment Clause does not proscribe opening prayers for legislative sessions.

Importantly, Marsh distinguished the situation of a legislative session opened by prayer from the public school setting. The Court stated that "[h]ere, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination'" [Citations omitted]. Accordingly, prayer before the opening of a legislative session was upheld as constitutionally valid.

Authorities have applied the Marsh case analysis to the opening of school board meetings with prayer. In Bacus v. Palo Verde Unified School District Bd. of Ed., 11 F.Supp.2d 1192 (C.D. Cal. 1998), the Court upheld a school board's opening its meetings with an invocation. There, the Court said the issue is whether the proper analysis for prayer to open a school board meeting is the test set forth in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) and Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) or whether "the school board is a deliberative public body which has the function of conducting the business of schools and as such, the analysis of Marsh v. Chambers applies and (2) under the Marsh test, the invocation held at the opening of the Board meeting is constitutional." 11 F.Supp.2d at 1195. The Court found that the Marsh case is controlling, saying that in Marsh the "Supreme Court held that the Nebraska legislature's practice of opening each legislative session with an invocation did not violate the Establishment Clause." The District Court in Bacus recognized that Marsh "opined that opening a legislative session with prayer did not present a real danger of establishing religion, and that the audience to which the prayer was directed were adults and presumably not susceptible to religious indoctrination or peer pressure."

The Bacus Court rejected the argument that a school board meeting should be considered a school function and thus controlled by the Lemon and Lee cases. "Members of a school board are elected public officials, not school children," concluded the Court. Furthermore, the Court noted that "the fact that at any given Board meeting there may be children present in the audience, some of whom may participate in an award session or address the Board on a particular topic, does not

change the nature or the function of the Board meeting. A Board meeting is a meeting of adults with official business and policy making functions.”

In addition, the Attorney General of Virginia recently reached a similar conclusion. See, 2000 WL 425388 (Va. A.G.) (March 13, 2000). There, the Virginia Attorney General reasoned as follows:

Like legislative prayer which is primarily directed to legislators themselves, the invocation in question is directed to the school board members. ... Additionally, the nature and function of the board meeting is a meeting of adults with official business and policymaking duties. ... The fact that two students voluntarily attend such meetings to provide input (along with any other students who may from time to time voluntarily attend such meetings) does not transform the board’s meetings from a policy and rule-making function into an official school function akin to a graduation ceremony or classroom instruction. It is thus my view that, like city councils and boards of supervisors, a school board is a deliberative public body charged with deciding business and policy issues. Consequently, it is also my view that the board’s meetings do not warrant the level of constitutional scrutiny required by the United States Supreme Court that an official public school function would warrant with regard to conducting prayer.

The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have yet to rule on this particular issue, and any such ruling is necessarily dependent upon the particular facts and circumstances. I am aware that the Sixth Circuit in *Coles v. Cleveland Board of Education* ... [171 F.3d 369 (6th Cir. 1999)] held that the Cleveland school board’s practice of opening its meetings with a prayer is constitutionally prohibited. In so holding, the court disputed that *Marsh* is controlling and found that a school board meeting is so integral to the public school system to be tantamount to a public school function. ... For the reasons discussed above, I do not agree with the court’s holding, which, of course, is not controlling precedent in Virginia. It is my opinion that the prayer at issue is the prayer of a public deliberative body which occurs in a fundamentally adult atmosphere rather than in a student-oriented or school-oriented atmosphere. Accordingly, based on the facts presented, it is my opinion that if members of a local school board wish to do so, they may open their board meetings with a prayer.

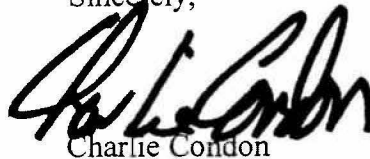
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Conclusion

Since time immemorial, public bodies such as legislatures, county and city councils and school boards have opened their meetings with prayer. The United States Supreme Court has ruled that these public deliberative bodies may constitutionally have an opening prayer to begin their sessions. The Court's ruling is based upon longstanding history and tradition as well as the nature of a meeting of a public body. In contrast to a public school, a meeting of a public body is held by adults to conduct the public business.

In my opinion, a court would give a prayer to open the School Board meeting the legal thumbs up. A prayer or invocation which opens a meeting of the Charleston County School Board is constitutional. This Office rejects any argument that a meeting of a school board is similar to a public school situation. While the school board governs public schools, it is not itself a public school. Therefore, the United States Supreme Court's restrictions on school prayer do not apply to meetings of the school board.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlie Condon", written over the typed name.

Charlie Condon
Attorney General

CC/an