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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

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The Honorable Rick Quinn
Majority Leader
South Carolina House of Representatives
518C Blatt Building
Columbia, South Carolina 29211

The Honorable Rita Allison
Member, House of Representatives
518B Blatt Building
Columbia, South Carolina 29211

The Honorable Jim Klauber
Member, House of Representatives
518A Blatt Building
Columbia, South Carolina 29211

Dear Representatives Quinn, Allison and Klauber:

You note that you have recently announced your intention to "introduce legislation that would amend the current Moment of Silence law to provide for language that clarifies that students have the legal right to silently pray in public schools in South Carolina." You indicate that one purpose of the legislation is to "re-establish that students have freedom of religion and not freedom from religion in public schools." You have requested an opinion "regarding whether a statute that provides students with the opportunity to silently pray, meditate or engage in other silent activities for one minute at the beginning of the school day would be constitutional."

Law / Analysis

Over the years, this Office has opined that "moment of silence" statutes are generally constitutional under the First Amendment of the United States Constitution. See, Op. Atty. Gen., May 14, 1998 (1998 WL 317593); Op. Atty. Gen., Op. No. 94-54 (September 22, 1994) (1994 WL 578561); Op. Atty. Gen., Op. No. 88-33 (April 11, 1988) (1988 WL 383516). Typically, a moment of silence provision recognizes that the public school day is filled with hectic activity and challenges for both students and teachers. Accordingly, it is appropriate at the beginning of each school day to observe a brief period of quiet in which students and teachers "can contemplate the challenges of the

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upcoming day and assume a frame of mind that promotes the proper atmosphere for learning and teaching." Op. No. 88-33, id. The question which is raised is whether such Moment of Silence statutes are constitutional under the Establishment Clause of the First Amendment.

Our analysis is that these statutes are constitutional. The Establishment Clause of the First Amendment prohibits the establishment of religion by the government. The United States Supreme Court has concluded that in order for a provision to pass muster under the Establishment Clause, a provision must possess a secular legislative purpose; secondly, its principal or primary effect must be one that neither advances nor inhibits religion; moreover, the statute must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.,Ct. 2105, 29 L.Ed.2d 745 (1971). Our 1988 Opinion referenced the United States Supreme Court decision of Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), which had found an Alabama "moment of silence" statute to be unconstitutional under the Establishment Clause of the First Amendment. Applying these principles, we concluded that a moment of silence law does not offend the Establishment Clause.

In should be noted, however, that in Wallace, the Supreme Court found the Alabama Moment of Silence statute to be unconstitutional under the first prong of the Lemon analysis. The Court decided that the statute had no clearly secular purpose and was motivated by a purpose to advance religion. The Court, in Wallace, based its conclusion upon such evidence of legislative intent as a statement inserted into the legislative record indicating that the legislation was an "effort to return voluntary prayer" to the public schools. 86 L.Ed.2d at 43. Wallace concluded that the addition of the words "or voluntary prayer" to the statute in question was for the sole purpose for 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.

In her concurring opinion in Wallace v. Jaffree, Justice O'Connor recognized that while the Alabama statute itself was unconstitutional because of the particular facts involved, an infringement of the Establishment Clause was not inevitable with respect to a moment of silence statute generally. Justice O'Connor noted that "[b]y mandating a moment of silence, a state does not necessarily endorse any activity that might occur during the period." 472 U.S. at 78.

Pursuant to that authority, South Carolina has enacted a mandatory moment of silence statute. Section 59-1-443 provides that "[a]ll schools shall provide for a minute of mandatory silence at the beginning of each school day." The purpose of the law was to allow students time to collect their thoughts in quiet contemplation at the beginning of each school day. Clearly, that provision does not mention or refer to prayer. However, prayer was clearly contemplated as one option for a student during the moment of silence. The present statute is clearly constitutional.

The question now becomes whether the kind of statute which you envision – one which provides students with the opportunity to "silently, meditate or engage in other silent activities for one minute at the beginning of the school day" would also pass constitutional muster under Wallace v. Jaffree and the recent decision of the United States Supreme Court in Sante Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). It is our opinion that the proposed statute, as you describe it, would be constitutional.

The recent decision of the Fourth Circuit Court of Appeals in Brown, et al v. Gilmore, et al, 258 F.3d 265 (4th Cir. 2001) is particularly instructive in addressing your question. In Brown, the Court considered the issue of the constitutionality of Virginia's statute which mandated that each school division in the state establish a "minute of silence" so that "each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice."

During the debates on the legislation, a sponsor of the Bill stated that it was his intent not to force prayer in the schools but that "[t]his country was based on belief in God, and maybe we need to look at that again." The leading sponsor added that

> ... we're not putting prayer on a higher pedestal or a lower pedestal than meditate and reflect. But if students would spend just one minute to reflect on who they are, what they're doing and where they're going. The word prayer in there was put in there so prayer would not be discriminated against.

258 F.3d at 271.

The plaintiffs attacked Virginia's legislation as violating the Establishment Clause of the First Amendment. Their constitutional assault was based upon the argument that the legislation was intended to return voluntary prayer to the public schools in Virginia. As part of plaintiffs' argument, it was urged to the Court that the Virginia Legislature had previously rejected all efforts to remove the word "pray" from the Bill and, thus, the goal of the Bill was to reestablish prayer in the schools. Furthermore, contended the plaintiffs, the legislation was no different from the moment of silence statute which the Supreme Court had struck down years earlier in Wallace v. Jaffree, supra.

The Fourth Circuit Court of Appeals, however, disagreed. At the outset, the Court recognized that a total separation of Church and State was not part of this "Nation's history." The Court noted that

> ... just as the Free Exercise Clause does not give the citizen having religious scruples an absolute right to escape the burdens of otherwise valid, neutral laws of general

> applicability, ... neither does the Establishment Clause preclude a government from "accommodating" religious scruple by, for example, voluntary exempting those with the particular religious scruple from the burden imposed by the legislation, even though the Constitution would not, in that circumstance, oblige an accommodation .... Not only is the government permitted to accommodate religion without violating the Establishment Clause, at times it is required to do so.

258 F.2d at 273.

Next, the Court noted that "[t]he line between establishment and accommodation 'must be delicately drawn both to protect the free exercise of religion and to prohibit its establishment.'" The Fourth Circuit noted, however, that the Supreme Court "has repeatedly drawn that line in a manner that has upheld a broad range of statutory accommodations against Establishment Clause challenges."

The Court then applied the Lemon three-prong test to the moment of silence statute. Accordingly, the criterion of whether the statute possessed a secular legislative purpose was first analyzed. The Court stressed that the important principle to remember is that the purpose of the Legislature need not be exclusively secular. Even though a statute has a religious purpose "it may still satisfy the Lemon test if it also has a 'clearly secular purpose.'" Deference in this regard was to be given to the Legislature's determination of purpose. With respect to the Virginia moment of silence statute, the Court was of the view that while Virginia's law had a clear religious purpose, it also was possessive of a secular purpose as well. Reasoned the Court,

> [t]he minute of silence statute in this case recites that in recognition of the right of pupils to the free exercise of religion and the right of pupils to be free from "pressure from the Commonwealth" to engage or not engage in any religious observation, the Commonwealth was establishing a minute of silence in each classroom ... . The statute states that the minute of silence is explicitly offered to the students for any non-distracting purpose - religious or nonreligious - including prayer or meditation .... It provides specifically, "each pupil may, in the exercise of his or her individual choice, meditate, pray or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." .... On its face, therefore, the statute provides a neutral medium-silence - during which the student may, without the knowledge of other students, engage in religious or nonreligious activity. And its stated purposes include the allowance of both religious and nonreligious activity with the only limitation that it be conducted in a manner that preserves the silence and does not interfere with other student's silent activity. Thus, as written in the statute, the silence is designed to be undirected and

> unthreatening; it is designed to compromise no student's belief or nonbelief; and it is designed to exert no coercion except that of maintaining silence.

258 F.3d at 276. Continuing, the Court found that, based upon the text of the statute, the Virginia law "has at least two purposes, one of which is clearly secular and one of which may be secular even though it addresses religion." The statute had a nonreligious purpose "to the extent that the minute of silence is designed to permit nonreligious meditation." Moreover, the statute was an accommodation of religion which "is itself a secular purpose in that it fosters the liberties secured by the Constitution." In addition, in the context of the legislative history, the Court noted that, while the statute was intended "to accommodate those children who wished to pray silently each day in school, that was but one of the intended purposes." Id.

Thus, in the Court's view, "[a] statute having dual legitimate purposes – one clearly secular and one the accommodation of religion – cannot run afoul of the first Lemon prong which requires only that there be a secular purpose." With respect to the other two prongs of the Lemon test, the Court found that the statute also met these as well. The Court reasoned that "[t]he second prong – that the statute's effect neither advance nor hinder religion – is clearly satisfied in this case, given the statute's facial neutrality between religious and nonreligious modes of introspection and other silent activity." Any argument that the statute's effect was to promote prayer, given the "viewpoint of young impressionable school children ...," was rejected by the Fourth Circuit. Such a fear was, in the context of a facial challenge to the statute's validity, was "speculative at best," concluded the Court. In the Court's analysis, "speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity." Id. At 277.

With respect to the third prong of the Lemon test, the Court concluded that the requirement that "the State not become excessively entangled with religion ... is undoubtedly satisfied." The Court assumed that the statute would be "enforced as written and that the teachers will apply it as directed by the superintendent [by simply informing] ... the students of their statutory options during an enforced minute of silence." Id. In summary, in the Court's view, the statute, by providing for a moment of silence "makes no endorsement of religion." The Virginia statute was instead according to the Court, nothing more than an effort by the Virginia Legislature at "providing a non-intrusive and constitutionally legitimate accommodation ..." of religion.

Conclusion

Neither the government nor the Legislature is required by the Constitution to wipe out all vestiges of religion in our public schools. While the public school is not a place of religion, religion has its place in the public schools. It is our opinion that the proposed statute providing students with the opportunity to silently pray, meditate or engage in other silent activities for one minute at the

beginning of the school day would be constitutional. The proposed statute is virtually identical to the Virginia Moment of Silence statute which the Fourth Circuit has upheld as constitutionally valid. Cases decided by the Fourth Circuit Court of Appeals represent the law in this circuit. In other words, the Fourth Circuit decision in Brown v. Gilmore is the law in South Carolina with respect to interpretation of the federal Constitution.

Our founding fathers surely did not envision our schools as being places where no silent prayer could ever be uttered by school children. A child has the right to pray silently to God even in the schoolhouse. There is a big constitutional difference between requiring a person to pray in school and accommodating that person's individual right to silently pray in school. The proposed Bill is not legislation which would establish or promote religion, but one which would protect the freedom of religion. The Bill would insure that a student could use the one minute of silence to pray if he or she so chose. The student would not be required to silently pray, but would be free to pray silently. Protecting the constitutional right of each student to silently pray at the beginning of each school day is constitutional. Rather than infringing upon a student's constitutional right to be free from religious intrusion, the proposed legislation protects the student's constitutional right to be free from religious discrimination.

Sincerely,

Charlie Condon
Attorney General