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# STATE of SOUTH CAROLINA

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ATTORNEY GENERAL

*Office of the Attorney General*
*Columbia 29211*

August 10, 1998

The Honorable Bradley Jordan
Member, House of Representatives
101 Kings Cove Drive
Anderson, South Carolina 29621

Re: **Guidelines for Religious Liberty In The Public Schools**

Dear Representative Jordan:

In a letter to this Office, you asked whether the State Department of Education may allow each school to authorize its students to vote to post a copy of the Ten Commandments in the school lobby without using public funds. If you had written me this question in 1980, I would have simply forwarded you a copy of the per curiam United States Supreme Court decision of Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) and told you that the Court had -- whether we liked it or not -- definitively decided the question -- in the negative. Despite the State of Kentucky's best efforts, by a 5-4 margin, the Court ruled that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature" and that the Establishment Clause was violated thereby.

Sensibly, in recent years, however, the Supreme Court, and other courts have, in a number of cases, generally upheld the rights of religious freedom, and specifically strengthened the exercise thereof in the school setting. Many of the Warren Court decisions, which demanded an "impenetrable wall of separation", have now been modified or undermined. The result is that the freedom to espouse religious ideas has been increased and protection from religious discrimination enhanced. Using common sense, the Supreme Court has stressed that the emphasis must be upon government neutrality, not hostility, toward religion. As one Justice has put it, "[t]he Religious Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." Board of Ed. of Kirgas Joel Village School Dist. v. Grumet, 512 U.S. 687, 114

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S.Ct. 2481, 2498, 129 L.Ed.2d 546 (1994) (O'CONNOR, J., concurring). In the words of one commentator, the Court has begun to recognize that "religion [is] not a separate entity apart from American society but ... one that is part of American Society, functioning like other parts ... and entitled to the same benefits." Dietrich, "Zobrest v. Catalina Foothills School District: Equal Protection, Neutrality, and the Establishment Clause," 43 Cath. Univ. Law Review 1209 (Summer, 1994).

As you know, this Office is frequently called upon to answer questions concerning the constitutional implications of religion in the public schools. In addition to the issue you have presented, we are often posed questions concerning school policies, such as the constitutional validity of a moment of silence or quiet contemplation, student release time, discriminatory treatment of Bible clubs, etc. Thus, in researching your question, we have prepared an extensive legal memorandum concerning the development of Establishment and Free Exercise Clause law, beginning with the Stone v. Graham, case, and continuing to the present time.[1] A copy of that Memorandum is attached. Based upon that extensive research, this Office will now summarize herein for you, as well as other public officials, the law not only with respect to your question, but also these closely related issues. In summary, our findings are as follows. A public school is not a place of religion, but religion has a constitutional place in the public schools.

## Law/Analysis

### THE TEN COMMANDMENTS

Contrary to popular belief, placement of the Ten Commandments in the public schools is not necessarily illegal and there are a number of contexts in which placement of the Ten Commandments on school property would be legal. Notwithstanding Stone, the Establishment Clause does not absolutely forbid the posting of the Ten Commandments on school property. Legality will depend upon the facts -- why the Ten Commandments are there; who put them there; the context in which they are there; and

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[1] South Carolina's equivalent to the federal Establishment Clause is found in Art. I, § 2 of the South Carolina Constitution. In addition, 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." It would appear that this latter provision is not applicable here, and thus our focus is primarily upon the Establishment Clause.

what an objective observer believes is the reason they are there. Context and content are, in other words, crucial with respect to constitutionality.

Among the criteria which courts look to in determining the legality pursuant to the federal Establishment Clause of any religious symbol display or exhibit, such as the Ten Commandments, are the following:

1. **The entire factual setting.** Constitutionality of any display or exhibit is fact-specific and fact-intensive.

2. **Involvement of school property.** A higher constitutional standard is undoubtedly imposed upon the public school setting than where a public park, or even a county courthouse, is concerned.

3. **Degree of governmental involvement.** Whether or not the State or school Board has affirmatively mandated the display or exhibit, or whether private choice is primarily involved. In the former instance, has the State singled out religion or a religious sect for special treatment or benefit?

4. **Governmental endorsement of religion.** Was the government's purpose in the display or exhibit to endorse or disapprove religion? Does the practice under review send a message of endorsement or disapproval? These two fundamental questions make the facts surrounding any exhibit or display critical. Courts will look to whether the religious symbol, such as the Ten Commandments (or a creche), is standing alone or is, instead, part of a secular theme. If, for example, the exhibit or display contains nothing more than the Ten Commandments, that is one thing, strongly suggesting religious purpose and effect. But if the Ten Commandments are part of a broader secular purpose, such as the teaching of law, culture or history, that is entirely different. Courts will focus upon whether the religious message is neutralized by the other parts of and the theme of the display. Important also is whether the government or school has affirmatively disclaimed any endorsement of religion. The bottom line when applying the "endorsement" test is that there must not be a government purpose of religious endorsement and that the community, as

an "objective observer", reasonably believes that no state or governmental endorsement has occurred.

5. **Coercion of students with respect to religion.** Courts also look to see whether the government is coercing students. Pursuant to this test, the lesser the degree of school or governmental involvement, the less is the coercive nature of the practice toward religion. The single most important reason leading to the constitutional demise of the prayer at graduation in the Lee v. Weisman case (discussed in the Memorandum) was the fact that "[t]he degree of school involvement ... made it clear that the graduation prayer bore the imprint of the State ... ." The concurring Justices distinguished, however, the Lee situation from one where the students themselves individually chose to deliver a religious message. In the latter situation, the concurrence made it plain that State endorsement would have been much less of a constitutional problem. Thus, student choice in any exhibit or display is a major factor militating toward validity.

6. **No discrimination against student's religious beliefs.** The Supreme Court has repeatedly held that if government creates a public or limited public "forum" through which various ideas or points of view may be expressed, it cannot, absent a compelling reason, discriminate based upon the fact that the content of the opinion deals with religion. Even if the forum is characterized as a "nonpublic" or "limited purpose", the exclusion of a person's religious speech is unlawful discrimination, when that speech meets the purpose of the forum and is no different from speech the school permits. In other words, schools cannot allow other types of speech, but prohibit religious speech. Moreover, students clearly possess First Amendment Free Speech rights, even at school. Thus, where the speech is that of the student's, important constitutional protections generally give the student the right to speak about and exercise religious expression. In this respect, the Court sharply distinguishes between **purely private speech** which is of a religious nature and **government speech** about or endorsing religion. The Court has, emphasized in the Mergens case that "[t]he proposition that schools do not

> endorse everything they fail to censor is not complicated." Accordingly, if government or a school opens a forum (whether public, limited public or nonpublic) in common areas for displays, exhibits, speeches or opinions, it must do so as well for religious symbols such as the Ten Commandments.
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> One could imagine a "wall of student ideas" or a display area where the Ten Commandments could be posted by students, for example, along with other thoughts or ideas reasonably presented in good taste. A good example of this line of thinking is evidenced by a recent opinion written by the California Attorney General. In Op. No. 96-507 (September 13, 1996), Attorney General Lundgren concluded that a high school student athletic field which provided space for advertising of the messages also had to accept the Ten Commandments. Citing Supreme Court decisions (referenced in the accompanying legal Memorandum), the California Attorney General concluded that the athletic field constituted an "advertising forum" which was secular in nature and that "[t]he principal or primary effect of the forum is to promote local business enterprise generally, not to advance or inhibit religion." Thus, a person wishing to display the Ten Commandments on school property as part of such advertising had to be treated the same as everyone else.

In short, as the case law illustrates, not every public action which indirectly involves religion is unconstitutional. Pursuant either to a non-endorsement or non-coercion theory, or under a forum or free speech theory, placement of the Ten Commandments on school property could pass constitutional muster. One or the other of these constitutional doctrines has been used to conclude that placement of the Ten Commandments in a public park is valid, see, State v. Freedom From Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995); or, that placement in a county courthouse would be, under different facts, see Harvey v. Cobb County, Georgia, 811 F.Supp. 669, 677 (D. Ga. Atlanta Div. 1993) affd., 15 F.3d 1097 (11th Cir. 1994); or, that a portrait of Christ donated and placed on school property might be constitutional, if displayed in a non-religious manner, as part of "many of the world's great religions on a common wall," see, Washegesic v. Bloomingdale Public Schools, 33 F.2d 679 (6th Cir. 1994); or, that distribution of Bibles and religious literature in a common area on school property is constitutionally permissible, Peck v. Upshur Co. Bd. Ed., 941 F.Supp. 1465 (N.D. W. Va. 1996); or, that using religious symbols to teach school children about religious

diversity is constitutional, Clever v. Cherry Hill Township Bd. of Ed., 838 F.Supp. 929 (D.N.J. 1993); or, that placement of the Ten Commandments on school property is valid. Op. Calif. Atty. Gen., No. 96-507, supra.

The Tennessee Attorney General, while recognizing the invalidity of a particular resolution relating to the Ten Commandments noted that in the Harvey v. Cobb County, case, the Court gave four months to the county to determine if there was a non-religious means to include the Commandments as part of a larger display of non-religious historical items. Op. Atty. Gen., (Tenn.) No. 96-022 (February 21, 1996) [placement of Ten Commandments in public schools is legal under certain circumstances]. Justice John Paul Stevens has said that the Ten Commandments can exist in a county courthouse where the display is part of the great figures and developments in law. See also, State ex rel. James v.State of Alabama ACLU, 711 So.2d 952, 977 (Ala. 1998) (Maddox, J. concurring in result) [concluding that a small plaque with Ten Commandments thereon in courtroom "is not State action that would tend to establish a religion within the meaning and purpose of the First Amendment."]. Moreover, in recent years, "[t]here has come into being a new body of legal knowledge that shows how the Ten Commandments traditionally were used to teach the moral restraint that undergirds obedience to law." Indeed, Circuit Judge John T. Noonan of the Ninth Circuit Court of Appeals concludes as a legal historian that the Ten Commandments "'have been the most influential law code in history.'" Kuntz, "The Ten Commandments on School Room Walls ...,". 9 U. Fla. L. J. and Pub. Policy 1, 2 (Fall, 1997).

The bottom line is this: if the placement of the Ten Commandments is not simply an endorsement of religion, but is part of a legitimate larger purpose to teach students about matters such as culture, law or history, or is part of student speech, it is legal. While an effort by school authorities to display only the Ten Commandments probably would not pass constitutional muster, a larger display designed to track students about law, history or culture most likely would. County of Allegheny v. ACLU, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed. 472 (1989); Texas Monthly v. Bullock, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989); Wallace v. Jaffre, 472 U.S. 38, 105 S.Ct. 2479, 97 L.Ed. 273 (1987).

## MOMENT OF SILENCE

As discussed in the accompanying Memorandum, a "moment of silence" or requirement of quiet contemplation is constitutionally valid so long as such requirement has a secular purpose. See Op. Atty. Gen., Op. No. 88-33 (April 11, 1988). Justice O'Connor has written that "[b]y mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period." Wallace v. Jaffre,

472 U.S. 38, 72-75, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'CONNOR, J., concurring). In Bown v. Gwinnett County School District, 895 F.Supp. 1564 (N. D. Ga. Atlanta Div. 1995), the Court held that a statute requiring a period of quiet contemplation or moment of silence was constitutional. A "moment of silence" is constitutional.

## RELEASE TIME

This Office has concluded that "a school district may, if it so chooses, adopt reasonable policies and procedures for released time for students" and that "as a general matter, a released-time program that permits public school students to be excused from attendance during regular school hours for the purpose of receiving religious instruction off school property does not violate the proscriptions of the First Amendment's religion clauses." Op. Atty. Gen. March 13, 1996 (Informal Opinion). That Opinion is reaffirmed herein.

## EQUAL ACCESS

A school district is required to permit those students who are members of a Bible Club to meet at the same time as it allows other clubs such as the chess club, violin club or ecology club to meet under the Equal Access Act and the Free Exercise Clause of the federal Constitution. Op. Atty. Gen., Feb. 10, 1988; January 13, 1998. The Supreme Court case law in this area is discussed extensively in the accompanying Memorandum. In summary, discrimination against religious groups, such as a Bible Club or the Fellowship of Christian Athletes, is thus illegal under federal and state law. See Ceniceros v. Bd. of Trustees of the San Diego Unified School Dist., 106 F.3d 878 (9th Cir. 1997).

## SCHOOL BOARD PRAYERS

The practice of a school board opening its meetings with prayer or a moment of silence has been upheld. In Coles v. Cleveland Bd. of Ed., 950 F.Supp. 1337 (N.D. Ohio 1996), the Court held that a prayer prior to a school board beginning its meeting did not violate the Establishment Clause. Relying upon Marsh v. Chambers, 463 U.S. 783, 103 3330, 77 L.Ed.2d 1019 (1983), a case where the United States Supreme Court upheld prayers prior to sessions of the State Legislature (discussed in the accompanying Memorandum), the Court concluded that Marsh was not limited to legislative sessions because "it is unreasonable to believe the framers would have applied the Establishment Clause differently among different deliberative bodies." Id. at 1347. The same conclusion was reached in Bacus v. Palo Verde Unified Sch. Dist., ___ F. Supp. ___, 1998 WL 430080 (C.D. Cal. 1998). But see N.C. Civ. Lib. Union Legal Foundation v. Constangy, 947 F.2d 1145 (4th Cir. 1991) [state court judge beginning court sessions with prayer is

invalid as a judicial endorsement of religion]. We agree that the rationale of Marsh is applicable to **school board meetings** and that a prayer at the beginning of such meetings would most likely be deemed constitutional.

## PRAYER IN PUBLIC SCHOOLS

What is prohibited by the Establishment Clause is state-sponsored or endorsed prayer in the public schools. However, students do not shed their rights to Free Speech and the free exercise of religion at the school house door. Students may "discuss religion and prayer discreetly with others ... ." Clark v. Dallas Ind. Sch. Dist., 671 F.Supp. 1119 (N.D. Tex. 1987). Of course, they may also pray alone while at school in a non-disruptive manner. See, Ingebretsen v. Jackson Publ. Sch. Dist., 864 F.Supp. 1473 (S.D. Miss. 1994). "There is no question that the Free Exercise Clause protects prayer and other religious expression in school as well as other places." Holmes, "Student Religious Expression In School: Is It Religion or Speech, and Does It Matter," 49 U. Miami Law Rev. 377, 411 (Winter, 1994).

The issue of student-initiated prayer at graduation exercises is a rapidly evolving area of the law and several courts have now concluded that such prayers are constitutionally valid. As discussed in the accompanying Memorandum, Lee v. Weisman, found state involvement in prayer at graduation unconstitutional. Recently, however, the Ninth Circuit Court of Appeals in Doe v. Madison School Dist., ___ F.3d ___, 1998 WL 279221 (1998) distinguished Lee in upholding student prayer at graduation. The Court stated that "Lee did not purport to erect a per se rule against religious activity in public school graduation ceremonies." In Doe, students delivered the graduation presentations, were selected on academic merit and individual students were given autonomy over the content of their presentations. The presentation was left up to the students entirely. Such was entirely different from Lee where the school itself procured the person to deliver the prayer. "Put simply" said the Court, "the First Amendment requires the government to maintain a position of neutrality toward religion." The school policy was "neutral on its face" and passed muster under the Lemon criteria of Establishment Clause analysis. Similarly, other cases have so held. See, Adler v. Duval Co. Sch. Bd., 851 F.Supp. 446, (M.D. Fla. 1994); Griffith v. Tevan, 794 F.Supp. 1054 (D. Kansas 1992); Chaduri v. Tenn., 130 F.3d 232 (6th Cir. 1997); Tunford v. Brand, 104 F.3d 982 (7th Cir. 1996); Jones v. Clear Creek Ind. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). Thus, in accord with the foregoing cases, where a student prayer at a graduation is completely student-initiated, without school involvement, such prayers probably do not violate the Establishment Clause.

## DISTRIBUTION OF RELIGIOUS LITERATURE

As discussed in the accompanying legal Memorandum, Peck v. Upshur Co. Bd. Ed., 941 F.Supp. 1465 (N.D. W. Va. 1996) upheld as constitutionally valid a School Board policy permitting non-students to disseminate Bibles and other religious materials in the public school during school hours. The school, in the past, had permitted other groups, such as the Boy Scouts, to disseminate literature and information. A table was located in a common area where students would not feel pressured and a sign designating the Bibles as "free" was conspicuously placed. The School did not announce the distribution. The Court held that the Establishment Clause was not violated by the distribution. This case is discussed more fully in the accompanying Memorandum.

Other cases also upheld the distribution of religious literature where other non-religious groups are permitted to distribute material on school property. See, Rivera v. East Otero Sch. Dist. R-1, 721 F.Supp. 861 (D. Colo. 1989). The School District policy prohibited the distribution by students of literature "that proselytizes a particular religious or political belief." The Court recognized that "[i]t is clear that the mere fact that student speech occurs on school property does not make it government supported" and thus the Establishment Clause was not violated. Moreover, students' Free Speech rights protected the distribution of religious literature. See also, Slotterback v. Interboro School Dist., 766 F.Supp. 280 (E.D. Pa. 1991) [public school is limited public forum for distribution of literature, thus requiring strict scrutiny analysis. In the Court's view, "if Interboro School district were passively to permit nondiscriminatory distribution of non-school written materials during non-instructional time, the school's students would be mature enough to understand that such a policy would not endorse -- but would, rather be neutral toward -- religious literature distributed at the school."]; Nelson v. Moline Sch. Dist. No. 40, 725 F.Supp. 847 (C.D. Ill. 1989) [prior regulations prohibiting distribution of political or religious literature on school grounds violated free speech requirements].

Courts have also held a school district policy, prohibiting students from distributing written material which expressed religious beliefs or points of view that students would reasonably believe to be sponsored, endorsed or given official imprimatur by the school, to violate the First Amendment. Hedges v. Wauconda Comm. Unit School Dist. No. 118, 9 F.3d 2351 (7th Cir. 1993). The Court described the basic question as "whether the school is entitled to silence its students, lest the audience infer that the school endorses whatever it permits." Id. at 1298. However, the fact that a junior high school was involved was not controlling because "nothing in the first amendment postpones the right of religious speech until high school ... ." In short, the Court concluded that "... the school need not worry that providing a central place for distribution will 'endorse' any

speaker, any more than providing a speaker's corner in Hyde Park endorses each of the many users ... ." Id. at 1300. See also, Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988).

## CONCLUSION

A public school is not a place of religion, but religion has a constitutional place in the public schools. Schools and religion are not enemies. The central thrust of the case law is to harmonize, in a sensible way, the prohibitions of the Establishment Clause with the protections of the Free Exercise and Free Speech Clauses. There are lines which the schools cannot cross because the Constitution protects the rights of all citizens of all religions or those with no religion at all. But there is also much common ground which schools and religion can legally share. While government cannot endorse religion, neither may it discriminate against those who wish to exercise it freely. Those who seek to espouse their own religious views cannot be treated as second-class citizens or social outcasts.

The answer to your question as to whether the Ten Commandments can be lawfully placed in the public schools is thus "yes." There are a number of factual scenarios where the existence of the Ten Commandments in the public schools would be perfectly legal and constitutional. Where the Ten Commandments are part of a legitimate, larger purpose or theme to teach students about law, history or culture, or where the Ten Commandments are placed in the schools as part of students' own speech without state endorsement, such would be constitutional. Based upon the foregoing, the proposal which you present (to allow the students to vote to post the Ten Commandments in the school lobby) would be constitutional if the display of the Ten Commandments is part of a larger theme to teach students about law, history or culture. Government neutrality is thus the key. Moreover, also constitutionally valid are moments of silence; student released time; and student members of Bible Clubs and other religious clubs having the same right to meet at school as other clubs. Also constitutional, in my judgment, are prayers at school board meetings; student-initiated graduation prayers where there is not government involvement; and student distribution of religious literature at school as well as, other forms of student religious expression.

Sincerely,

Charles M. Condon
Attorney General

CMC/ph
Attachment