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The State of South Carolina

Opinion No 87-72

Office of the Attorney General

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April 15, 1987

The Honorable Harriet H. Keyserling
Member, South Carolina House of
Representatives
519C Blatt Building
Columbia, South Carolina 29211

Dear Representative Keyserling:

You have requested the advice of this Office as to the constitutionality of an activity held at a public high school. According to the information provided, the activity consisted of an exhibition basketball game involving faculty members of the school and an outside group that gave a talk on christianity and patriotism following the game. These activities were held during school hours at an assembly of students from which students could be excused if they did not wish to attend. Your question raises the issue of whether the activity violates the "Establishment Clause" of the First Amendment of the United States Constitution which prohibits governmental establishment of religion.

"The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.... The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' [Lemon v. Kurtzman, 403 U.S. 602, 614, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971)]." Lynch v. Donnelly, _____ U.S. _____, 79 L.Ed.2d 604, 613, 104 S.Ct. 1355 (1984).

In analyzing establishment clause cases, the Supreme Court has employed a three prong inquiry known as the "Lemon test" (see Lemon, supra) which assesses "....whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion..." Lynch at 613; Wallace v. Jaffree, 459 U.S. 1314, 86 L.Ed.2d 29, 105 S.Ct. 2479, 2494 (1985); Witters v. Washington Department of Services for the Blind, _____ U.S. _____, 88 L.Ed.2d 849, 106 S.Ct. 748 (1986). Therefore, the

activity in question could be found to be unconstitutional if it were not motivated by any clearly secular purpose, if it had the primary effect of advancing religion, or if it fostered excessive governmental entanglement with religion. See Wallace, supra.

Within the format of opinions of this Office, these standards cannot be applied to the facts of this matter so as to draw conclusions about its constitutionality. To do so would require fact finding and adjudication that do not fall within the scope of opinions of this Office. (Ops. Atty. Gen., December 12, 1983). Moreover, the United States Supreme Court, itself, has recognized that Establishment Clause cases are difficult and that the Supreme Court's decisions have sacrificed "clarity and predictability for flexibility." Committee for Public Education v. Regan, 444 U.S. 646, 63 L.Ed.2d 94, 107, 100 S.Ct. 840 (1980). Nevertheless, the following cases provide some guidance as to those activities that the courts have found impermissible.

The primary aspect of the activity in question that involves religion is the talk on Christianity. The teaching of religion within public schools is not impermissible under all circumstances. Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963). Abington made the following comments about permissible religious instruction in public schools:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment. 40 L.Ed.2d at 860.

In Abington, the Court found that daily required Bible readings at the opening of the school day and the recitation of the Lord's Prayer were religious exercises not falling into the above categories of permissible secular study. 83 S.Ct. at 1572 and 1573. See also, Stone v Graham, 449 U.S. 39, 66 L.Ed.2d 199, 101 S.Ct. 192, 144 (1980). In People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461 (1948), the Court ruled unconstitutional a system in which an association of Jewish, Roman Catholic and Protestant denominations offered classes in religion at public schools which were held during school hours

but from which students could be excused. In Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir., 1981), the Court found unconstitutional the practice of having members of the student body say prayers to open student council scheduled assemblies. The Court found that this practice had no apparent secular purpose, that it appeared to advance religion and that it excessively entangled government with religion in the supervision of the assemblies. 644 F.2d at 762. The court noted that the optional or voluntary character of all of the above noted events in Abington, McCollum and Collins did not furnish a defense to the claims of unconstitutionality.

These cases indicate that the religious presentation about which you have asked might have been permissible if "...presented objectively..." such as in a study of history or comparative religion." Abington, 83 S.Ct. at 1573. If this ceremony were not presented objectively in this manner and were found by a court to have the purpose and effect of advancing religion or of entangling government with religion, the activity could be held to be unconstitutional. The degree of involvement of school officials in this activity such as the participation of faculty members in the basketball game, the supervision or sponsorship of the assembly, and the scheduling of the activity during school hours would be important factors to a court in assessing constitutionality under the above authority. As noted above, that students could be excused from the activity would probably not present a defense to a supported claim of unconstitutionality.

Finally, the activity in question may not fall within the terms of the Equal Access Act (P.L. 98-377-Title VIII) which addresses student initiated events. This law permits students to meet at school facilities during non-instructional time regardless of the religious or other content of the speech at such meetings when the school has allowed one or more non-curriculum related student groups to meet during such time. The activity must be voluntary, student initiated, and not sponsored by the school and its agents. This Act would not appear to apply here if the school and its agents acted to sponsor the event, if the activity were not student initiated or if it occurred during a period of the school day normally devoted to curriculum related activities. The law does not regulate non-student initiated events.

In conclusion, case law indicates that the religious content of the activity in question might have been permissible if presented objectively in connection with the curriculum of the school such as in the context of a history or comparative religious instruction. The activity should not have had a religious purpose, nor a principal or primary religious effect nor should it have excessively

entangled school officials with religion. If the event were student initiated during non-curriculum time, and were held without school sponsorship, the Equal Access Act might have provided authorization for it. Application of these standards to the activity in question, requires fact finding and adjudication of facts that do not fall within the scope of opinions of this Office (Atty. Gen. Opn., December 12, 1983); however, such matters are ones as to which school officials should carefully consult with their local attorneys who are familiar with applicable case law and facts.

If I may be of other assistance, please let me know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

JESjr/srcj

REVIEWED AND APPROVED BY:

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