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April 16, 1985

The Honorable Warren K. Giese
Member, South Carolina Senate
Gressette Senate Office Building
Suite 602
Columbia, South Carolina 29202

Dear Senator Giese:

You have asked our interpretation of S-298. Specifically, you wish to know "whether or not the bill would permit teachers to allow a period of silence if they so choose, or if it would require that all teachers allow a period of silence." We would advise that the bill as drafted simply permits a teacher to allow a period of silence, but does not require the teacher to do so.

S-298 in its present form, provide as follows:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each class is held may announce that a period of silence, not to exceed one minute in duration, must be observed for meditation or voluntary prayer, and during the period, no other activity may be engaged in. (emphasis added).

Particular note should be made of the General Assembly's use of the word "may" in the context of a teacher's announcement of a moment of silence. The word "may" is a word ordinarily connoting discretion. 26A Words and Phrases, p. 386 et seq. While the word "shall" or "must" is mandatory, the word "may" is merely advisory or permissive. Carolina Music Co. v. Query, 192 S.C. 308, 320, 6 S.E.2d 473 (1939). When "may" is used in a statute, it usually means merely "to give permission". Massey v. Glenn,

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106 S.C. 53, 90 S.E. 321 (1916). Thus, the General Assembly's use of the word "may" in S-298 would clearly evidence an intent that teachers in all public schools were authorized or permitted to allow a period of silence, but that such remained in the discretion of the individual teacher.

This reading is supported by other parts of the proposed statute. It is well recognized that the title of an act may be considered in determining the intent of the Legislature. Ponder v. City of Greenville, 196 S.C. 79, 12 S.E.2d 851 (1941). In this instance, the title to S-298 reads as follows:

A BILL TO PERMIT TEACHERS IN ALL GRADES
IN PUBLIC SCHOOLS TO ANNOUNCE THAT A PERIOD
OF SILENCE MUST BE OBSERVED FOR MEDITATION
OR VOLUNTARY PRAYER AT THE COMMENCEMENT OF
THE SCHOOL DAY. (emphasis added).

The Legislature's use of the term "permit" in the title is entirely consistent with the use of the word "may" in the body of the bill because the word "permit" means "to empower" or "to authorize." The word "permit" is not mandatory in nature.

Moreover, it should also be noted that the Legislature used the word "may" in juxtaposition to the word "must" in the body of the bill. [teacher "may announce that a period of silence ... must be observed...."] As stated by a leading treatise writer on statutory construction,

Where both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings. This is especially true where "shall" and "may" are used in close juxtaposition under circumstances that would indicate that a different treatment is intended for the predicates following then.

Since the General Assembly in S-298 uses the word "may", followed closely by the word "must", it would appear that the ordinary meanings of both terms was intended; accordingly, it would appear the Legislature intends by the bill to leave it within the discretion of individual teachers to allow a moment of silence but where the teacher so decides, the period of silence then

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becomes mandatory for that class. In other words, where the teacher chooses to allow a moment of silence, "no other activity may be engaged in."

This reading of S-298 is consistent with interpretations of similar "moment of silence" statutes elsewhere. See, Wallace v. Jaffree, 80 L.Ed.2d 178, 179 (1984) [identical Alabama statute "permits ... but does not require teachers in public schools to observe up to a minute of non-activity ..."]; Duffy v. Las Cruces Pub. Schools, 557 F.Supp. 1013 (D.N.M. 1983) [school board may authorize period of silence]. By comparison, other statutes providing for a moment of silence in public schools have made such periods of silence mandatory upon the teacher. See, Beck v. McElrath, 548 F.Supp. 1161 (M.D.Tenn. 1982), vacated and remanded 718 F.2d 1098 (6th Cir. 1983) ["the teacher ... shall announce that a period of silence ... shall be observed ..."]; May v. Cooperman, 572 F.Supp. 1561 (D.N.J. 1983) ["principals and teachers ... shall permit ... a 1 minute period of silence ..."] See also, Note, Daily Moments of Silence In Public Schools: A Constitutional Analysis, 58 N.Y.U. Law Review 364, 371 (1983). [certain state statutes authorize a moment of silence, others require it.]

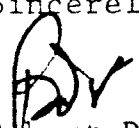
I would also mention to you, as I am sure you are aware, that the constitutionality of a statute identical to S-298 is presently before the United States Supreme Court, awaiting decision. Wallace v. Jaffree, supra [Alabama statute].

CONCLUSION

In conclusion, we would advise that S-298 permits a teacher to allow a period of silence, but does not require the teacher to do so.

If we can be of further assistance, please let us know.

Sincerely,


Robert D. Cook
Executive Assistant for Opinions

RDC:djg