

January 7, 2002

Senator Dean Cameron
Idaho State Senate
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Cameron:

Thank you for your recent letter inquiring whether there are any legal or constitutional impediments that would prohibit the Minidoka County School District from adopting a policy requiring a mandatory moment of silence at the commencement of the school day. In your letter, you enclosed a copy of a proposed policy of the Minidoka County School District. The school district is aware that the adoption of a policy mandating a moment of silence would be controversial.

FACTS

Many states have adopted statutes mandating a moment of silence at the beginning of each school day. In addition, even in those states that do not have legislation mandating a moment of silence, school districts have adopted policies such as the one being considered by the Minidoka County School District.

The proposed policy, which you have provided to me, states:

Joint School District No. 331, Minidoka, Jerome, Lincoln and Cassia Counties, intends to create, and does hereby create a two minute moment of silence at the beginning of each school day. It is further the intent and policy of this District to comply fully with Santa Fe v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000), therefore, the District shall not establish, require, instigate, or endorse prayer or other religious expression by students. Likewise, the district shall maintain its viewpoint neutrality and not suppress, forbid, interfere with, discourage or disparage voluntary religious expression.

Nothing in this policy abrogates the District's right to prohibit and/or punish obscene speech, which is not protected by the first amendment (Ginsberg v. New York, 390 U.S. 629, 635 (1968)), the use of vulgar terms and offensive lewd and indecent speech (Bethel School District v. Fraser, 478 U.S. 675, 683, 685 (1986)), and students' actions that materially and substantially disrupt the work and discipline of the school, or substantially

disrupt or materially interfere with school activities (Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 514 (1968)).

(Verbatim.)

In addition, as part of this policy, the district has adopted guidelines that provide:

1. The moment of silence shall be for two minutes at the beginning of each day and shall be supervised by the classroom teacher or other appropriate school personnel.
2. The classroom teachers and all other school personnel shall maintain viewpoint neutrality and shall not suppress, forbid, interfere with, discourage or disparage voluntary religious expression. Furthermore, teachers and all other school personnel shall not establish, require, instigate, or endorse prayer or other religious expression by students.
3. When initiating the moment of silence, classroom teachers and all other school personnel shall only refer to it as a “two-minute moment of silence.”
4. Students shall remain quiet for the two-minute moment of silence.

SHORT CONCLUSION

Given the controversial nature of a “moment of silence” and its association with religious meditation or prayer, it is likely that if the district should adopt the proposed policy, or one substantially similar, the policy will be challenged in court. The more difficult question is the outcome of any court challenge.

If a moment of silence is adopted for an appropriate purpose and if the policy is properly drafted, it is more likely than not that a court will uphold a district policy authorizing or mandating a moment of silence at the beginning of each school day. The ultimate outcome will depend on the precise wording of the policy but, more importantly, the facts and statements surrounding the adoption of the moment of silence policy and, in particular, the apparent purpose for the adoption of the policy. If a court determines that the policy was adopted to foster religion or to introduce prayer into a public school classroom then the policy would be struck down. If, on the other hand, the court is convinced that the policy was adopted to instill a proper sense of decorum at the beginning of the school day and to assist students in focusing their thoughts and reflecting on the tasks before them and if the court is persuaded that the policy neither encourages children to pray nor discourages those who are inclined to pray from doing so, then the court would most likely uphold the policy.

Because of the close scrutiny any policy adoption will receive by a reviewing court, I suggest that any policy adopted by the district be simple and concise in nature. The district may simply wish to model its policy after the statute in Virginia, which has been reviewed by the Fourth Circuit Court of Appeals and which simply mandates:

The school board of each school district shall establish the daily observance of one minute of silence in the classroom of the division. During such period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end 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.

Virginia Code Ann. § 22.1-203. Perhaps a better approach than that followed by Virginia would simply be to mandate a moment of silence, not to exceed two (2) minutes, for silent meditation. In the guidelines implementing the policy, it could then be explained to teachers that the time for meditation could be used for silent reflection, thought or prayer and teachers would be cautioned to neither encourage nor discourage religious activity.

It is also advisable for the school board to adopt specific findings explaining their rationale for adopting the policy. If the district's rationale is to foster or encourage religion, then the policy should not be adopted. If, however, the school board members wish to consider a moment of silence as an instrument to give greater solemnity and purpose to the school day and because it helps students in the transition from home or playground to school and enables students to pause, settle down and to compose themselves and focus on the day ahead in order to make for a better and more productive school day, then that should be reflected in the district's findings.

ANALYSIS

The First Amendment to the U.S. Constitution provides in relevant part:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof

The First Amendment is made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. Similarly, article 1, § 4, of the Idaho Constitution guarantees religious liberty, providing:

Guaranty of religious liberty.—The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his

religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.

At least one Idaho case has held that article 1, § 4 of the Idaho Constitution “is an even greater guardian of religious liberty” than its federal counterpart. Osteraas v. Osteraas, 124 Idaho 350, 859 P.2d 948 (1993). This point is important to consider because I have been unable to find Idaho court cases dealing with the issue of a moment of silence in the public schools. The analysis contained herein is based solely upon an analysis of federal court cases decided under the federal Constitution. While it is likely that article 1, § 4, will cause a court to deal with this issue in a manner that is consistent with federal precedent, it is possible that an Idaho court, interpreting the actions of the school board, and applying the Idaho Constitution, could come to a result inconsistent with the federal cases discussed.

The school district could adopt a policy that would be constitutionally valid authorizing a moment of silence if the moment of silence neither advocates nor discourages prayer. The adoption of such a policy would no doubt be scrutinized and the ultimate issue of the constitutionality of such a policy would hinge not only upon the precise wording adopted, but also the facts and circumstances surrounding its adoption. As Justice O’Conner noted in her concurring opinion in Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985):

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over another should pass this test.

472 U.S. 76, 105 S. Ct. 2500 (1985) (citations omitted). As Justice O’Conner notes:

The crucial question is whether the state has conveyed or attempted to convey the message that children should use the moment of silence for

prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

Id. at 73-74. Because the facts, circumstances and the intent of those adopting moment of silence laws are so closely scrutinized, many of these cases turn more on fact than on the precise language adopted.

At issue in Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000), was whether the Santa Fe School District's policy, permitting student-led and student-initiated prayer at football games, violated the Establishment Clause of the U.S. Constitution. The policy of the district provided that each spring, under the advice and direction of each high school principal, the student council would conduct an election whereby the student body would elect, by secret ballot, whether to have a message from a student to be delivered at a pre-game ceremony which would serve to solemnize the sporting event and to promote good sportsmanship and student safety. If the student body elected to have such a message, then a student would be selected from a list of student volunteers to deliver the statement or invocation. The same student would give an invocation before each home football game. These messages always consisted of a student-led prayer which was delivered over the loudspeaker system, owned and controlled by the high school.

The Supreme Court ruled that the invocation consisted of a state sponsorship of the dominant religion that existed in that school district. The district argued that the invocation just happened to be a prayer and that, in fact, the policy was adopted to serve a secular purpose, and that the solemnization of a football game served to promote sportsmanship. The opinion noted that it is the duty of the courts to distinguish a sham secular purpose from a sincere one. The consistent practice of offering prayers before a football game amounted to a state sponsorship or endorsement of religion. The policy was struck down.

It is interesting to note, however, that although the policy was struck down, the Court noted in its opinion:

Thus, nothing in the Constitution as interpreted by this court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular religious practice of prayer.

530 U.S. at 313, 120 S. Ct. at 2281.

The Fourth Circuit Court of Appeals took up the issue of a moment of silence in Brown v. Gilmore, 258 F.3d 265 (4th Cir.), *cert. denied*, 122 S. Ct. 465 (2001). The issue before the court was the validity of the Virginia law mandating a minute of silence at the beginning of each school day during which each student could exercise the choice of meditating, praying or engaging in any other silent activity that does not disrupt the activities of other students. The court in Gilmore was deciding the validity of Virginia Code Ann. § 22.1-203. The specific provision in the statute provides:

Each pupil may, in the exercise of his/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.

The court found that the statute provided a neutral medium during which the student may, without the knowledge of other students, engage in religious or non-religious activity. *Id.* at 265. The Fourth Circuit upheld the statute, stating:

The minute of silence established in Virginia by Section 22.1-203 for each public school classroom is designed to provide each student at the beginning of each day an opportunity to think, to meditate, to quiet emotions, to clear the mind, to focus on the day, to relax, to doze, or to pray—in short, to provide the student with a minute of silence to do with what the student chooses. And just as this short period of quiet serves the religious interests of those students who wish to pray silently, it serves a secular interest of those who do not wish to do so. Because the state imposes no substantive requirement during the silence, it is not religiously coercive. Neither the teacher nor any student will know how any other student uses the time because it is, fortunately, inherent in the human constitution that what transpires in the mind cannot be known by others.

The statute's use of the word "pray" in listing an unlimited range of mental activities that are authorized during the minute of silence, cannot by itself be a ground for finding the statute unconstitutional. Indeed, to require a ban on the use of religiously related terms would manifest hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution.

Id. at 281-82.

As indicated by the citation, the Supreme Court declined to review the Virginia case. It was the finding of the Fourth Circuit that at least one purpose of the statute was secular even though the statute addressed religion. The Fourth Circuit held that by providing a moment of silence the state was making no endorsement of religion and the

court appeared to be persuaded, at least in part, by the legislative history which indicated that the moment of silence would assist in establishing a sense of calm and stability in the public schools by offering students a peaceful minute each day to reflect upon their studies, to collect their thoughts and to generally prepare themselves for the task before them.

In Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2499 (1985), the Supreme Court struck down an Alabama statute which was, in many respects, similar to the Virginia statute reviewed by the Fourth Circuit in Gilmore. The Wallace case is distinguishable both in the particular statute being reviewed and, more importantly, in the legislative history of the Alabama statute. The Alabama statute had several parts. Part of it mandated a moment of silence, but another portion authorized teachers to lead willing students in vocal prayer. Regarding the purpose for which the legislation was adopted, the Supreme Court noted statements of the bill's sponsor found in the legislative record that the purpose of the legislation was to return voluntary prayer to the public schools and that it was the sponsor's intent to provide children with the opportunity to share in the spiritual heritage of both the state and the nation. In a trial before the district court, the Senator also testified unequivocally that this was his sole purpose in sponsoring the legislation. The evidence in the case also showed that a number of teachers led their students in prayer each day before class.

The Court defined the issue in Wallace as:

The narrow question for decision is whether Section 16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the first amendment.

472 U.S. at 41-42, 105 S. Ct. at 2482.

The State of Alabama failed to produce any evidence in the case of a secular purpose for the statute. The plaintiffs, on the other hand, produced a legislative history as well as testimony from the bill's sponsor that the sole purpose of the bill was to further religion. It appears that, based on this, the U.S. Supreme Court struck down the Alabama statute.

Justice O'Connor concurred in the Court's opinion, but in her concurring opinion she indicated that a statute mandating a moment of silence was not an affront to religious liberty:

Scholars and at least one member of this court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. As a general matter, I agree. It is difficult to discern a

serious threat to religious liberty from a room of silent, thoughtful school children.

472 U.S. at 72-73, 105 S. Ct. at 2498 (citations omitted).

In determining the validity of a moment of silence law a reviewing court will undoubtedly apply a three-part test first articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1975). In order to pass this three-part test it must be found: (1) that the statute in question must have a secular legislative purpose; (2) that the principal effect of the statute must be one which neither advances nor inhibits religion, and finally; (3) the statute not excessively entangle government with religion.

In Doe v. Madison School District, 7 F. Supp. 2d 1110 (D. Idaho 1997), the federal district court applied the Lemon test to a policy of the Madison School District, which authorized the top four students from the high school graduating class to make an address at the graduation. The graduation policy authorized the invited students to give an appropriate, uncensored presentation that could include an address, a poem, a reading, a song, a musical presentation, a prayer or any other pronouncement. The policy indicated that the school administration would not censor any presentation, but advised participants to use appropriate language for the audience and occasion. The plaintiffs in the case sued because the policy mentioned, as one option, a prayer. It was the contention of the plaintiffs that the qualification to make an address “according to class standing” was not specific enough to preclude school officials from choosing students who are known members of the LDS church and who would be likely to give a prayer at the ceremony.

Despite plaintiffs’ concerns, their challenge to the Madison County policy was rejected. The court found that the policy did not run afoul of the Lemon test and noted that the neutrality of the policy furthered the secular purpose of the district to allow chosen students to solemnize an important ceremony in the manner of their own choice.

Adopting a moment of silence policy, which would require a moment of silence not to exceed one to two minutes at the beginning of each school day, could come under greater scrutiny than a policy such as the one adopted by Madison County schools because of the greater frequency of a daily moment of silence. There is some indication that this greater frequency could cause a court to scrutinize both the purpose and the effect of the policy as well as the way in which the policy is administered.

CONCLUSION

A carefully drafted policy which is adopted for a neutral and non-religious purpose and which does not have the effect of furthering or deterring religious beliefs would probably pass constitutional muster. How such a policy is administered could affect a

court's ultimate determination on its constitutionality. If a district is pursuing such a policy in order to further religion, then a policy should not be adopted. If it is adopted for religious purposes it will most likely be struck down. During the moment of silence the teachers should not be engaged in furthering or hindering religious practices.

Finally, as was noted at the beginning of this guideline, it should be cautioned that there are no Idaho court cases applying the Idaho Constitution to a moment of silence. On this particular issue, the Idaho Constitution will probably be read in a manner that is consistent with federal case authority. However, there is at least some indication that an Idaho court could construe the Idaho Constitution as being a greater guarantor of religious liberties. How this role of being a greater guarantor would affect the ultimate outcome of a case cannot be said with certainty.

Sincerely,

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Division