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July 12, 1985

ATTORNEY GENERAL OPINION NO. 85- 83

The Honorable Joe Knopp
State Representative, 67th District
410 Humboldt
Manhattan, Kansas 66502

Re: Schools -- Miscellaneous Provisions -- Statute Authorizing Period of Silence in Public School Classrooms; Constitutionality

Synopsis: K.S.A. 72-5308a authorizes the teacher in charge of each public school classroom to observe, at his or her option, a brief period of silence at the opening of each school day. Such a period of silence is not to be conducted as a religious exercise, but is to be used for silent prayer or silent reflection on the activities of the day. In that both the statute itself and the legislative history of this and subsequent bills indicates a legislative purpose which is not exclusively religious, the statute is not invalid under the holding of the United States Supreme Court in Wallace v. Jaffree, -- U.S. --, 105 S.Ct. 2479 (1985). Cited herein: K.S.A. 72-5308a; U.S. Const., First Amend.

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Dear Representative Knopp:

As Chairman of the House Judiciary Committee, you request our opinion concerning the effect of a recent decision of the United States Supreme Court on a Kansas statute which permits a period of silence at the outset of each day in the state's public schools. Specifically, you inquire whether the decision in Wallace v. Jaffree, -- U.S. --, 105 S.Ct. 2479 (1985), which invalidated an Alabama statute authorizing "meditation or

voluntary prayer," also invalidates K.S.A. 72-5308a. After examining the language of the statute and the Court's reasoning, it is our opinion that the Kansas statute remains valid.

Enacted by the Kansas Legislature in 1969 and unamended to the present, K.S.A. 72-5308a states as follows:

> "In each public school classroom the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day." (Emphasis added.)

No legislative history exists for the statute, which was contained in an omnibus act and which was added during floor debate in the House of Representatives (1969 House Journal 434), nor does the statute appear to have replaced any prior legislation on this subject. While efforts have been made during three subsequent sessions of the legislature to amend the statute to make its provisions mandatory and to strengthen the emphasis on prayer, none have been adopted. (1979 Senate Bill No. 96, 1980 House Bill No. 3162, 1981 House Bill No. 2258). The most recent of these efforts would have replaced K.S.A. 72-5308a with the following language:

> "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 shall announce that a period not to exceed one minute in duration shall be observed for meditation or prayer and, during such period, silence shall be maintained and no activities shall be engaged in by the teacher or pupils in the class." (Emphasis added.)

Such legislative history is important in light of the way in which the Supreme Court examined the Alabama statute at issue in Wallace v. Jaffree, supra. There, the Alabama Legislature had initially (in 1978) enacted a statute which provided for the observing of a one-minute period of silence "for meditation," during which time no activities could be engaged in. Although the statute was mandatory in its effect ["the teacher in charge . . . shall announce"], it was found to be valid by the lower

federal court in the Jaffree case, a finding which was not contested upon appeal. The same can not be said of the two subsequent efforts of the Alabama Legislature, enacted in 1981 and 1982 respectively. Optional in their provisions, they permitted "meditation or voluntary prayer" in the case of the 1981 law and a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world" in the 1982 act. After the federal appellate court found the 1982 act unconstitutional [Jaffree v. Wallace, 705 F.2d 1567, 1535-1536 (11th Cir. 1983)], the only question left for the Supreme Court concerned the validity of the 1981 statute.

While similar on its face to K.S.A. 72-5308a, the 1981 Alabama statute [Alabama Code §16-1-20.1 (Supp. 1984)] has a very different legislative history. The facts surrounding the statute's passage were found by the Court's majority opinion to be of great weight in determining whether the statute had a valid secular purpose. Such a determination is part of a three-pronged test which the Court has used in the past in determining the scope of the Establishment Clause of the First Amendment to the United States Constitution ["Congress shall make no law respecting an establishment of religion"]. As the Court noted in Jaffree:

> "When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), we wrote:
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> "'Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." Walz [v. Tax Commission, 397 U.S. 664 (1970)].'
>
> "It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no

> consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, e.g., Abington School Dist. v. Schempp, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." 105 S.Ct. at 2489-90 (Emphasis added.)

In examining the background of the Alabama statute, the court in particular noted that the bill's sponsor had clearly stated, both at the time of consideration and later during the district court action, that the bill was an effort to return voluntary prayer to the schools, and that no secular purpose existed. The State of Alabama was unable to provide any such purpose, and the Court concluded that either the legislature intended to make a change from the existing law which by adding voluntary prayer, or the 1981 statute was a meaningless exercise. Not surprisingly, the Court rejected the latter explanation, and found that the statute had only a religious purpose. As such, it characterized prayer as a favored practice and thus represented an endorsement by the State of Alabama of religion, and so was in violation of the Establishment Clause of the First Amendment. 105 S.Ct. at 2492-93.

As noted earlier, the legislative history of the Kansas statute is diametrically opposed to that of the Alabama measure at issue in Jaffree. No statement of legislative intent to place prayer in schools exists, and the subsequent action of the legislature in rejecting efforts to this effect shows that K.S.A. 72-5308a was not intended to represent a legislative statement endorsing prayer as a favored practice. The language of the statute itself states that the period of silence is not to be conducted as a religious exercise, and arguably has the secular purpose of calming school children and preparing them to concentrate on their studies. While such a period also facilitates voluntary, silent prayer, a statute can be found valid even if it has a mixture of secular and religious purposes, as the Court in Jaffree notes. 105 S.Ct. at 2490.

While it is always difficult, if not impossible, to predict what a court will say on a matter which is not before it, especially when First Amendment questions are involved, we believe that both the opinion of the majority of the Supreme Court in Jaffree and the

concurring opinion of Justice O'Conner contain language which would allow the Kansas statute to withstand a constitutional challenge. Justice Stevens, in writing for the majority, states that "[t]he legislative intent to return prayer to the public school is, of course, quite different from merely protecting every student's rights to engage in voluntary prayer during an appropriate moment of silence during the school day." 105 S.Ct. at 2491. Justice O'Conner, while joining in the majority opinion, states in her concurring opinion that:

> "By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. Cf. Widmar v. Vincent, 454 U.S. 263, 272, n. 11 (1981) ('by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there'). Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. 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." (Citation omitted.) 105 S.Ct. at 2499.

In conclusion, K.S.A. 72-5308a authorizes the teacher in charge of each public school classroom to observe, at his or her option, a brief period of silence at the opening of each school day. Such a period of silence is not to be conducted as a religious

exercise, but is to be used for silent prayer or silent reflection on the activities of the day. In that both the statute itself and the legislative history of this and subsequent bills indicate a legislative purpose which is not exclusively religious, the statute is not invalid under the holding of the United States Supreme Court in Wallace v. Jaffree, -- U.S. --, 105 S.Ct. 2479 (1985).

Very truly yours,

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