LETTER OPINION
2001-L-04

February 15, 2001

Honorable Aaron Krauter
State Senator
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Senator Krauter:

Thank you for your February 6, 2001, letter requesting my opinion regarding the constitutionality of Engrossed House Bills 1128 and 1437 and Engrossed Senate Bill 2177. You request my assurance that a constitutional challenge to those bills would be unsuccessful or a recommendation as to how to amend the bills to assure that they survive any constitutional challenge. You also request my opinion on how to amend the bills so that any costs of defending a lawsuit and any damages would be assumed by the State rather than the individual teachers, administrators, school board members, or local school districts.

It is the responsibility of the Attorney General to defend the constitutionality of state statutes. Accordingly, if any of the bills passes and is signed by the Governor, this office may be called upon to defend it. If enacted, it is presumed "[c]ompliance with the constitutions of the state and of the United States [was] intended." N.D.C.C. § 1-02-38. Accordingly, this office would zealously defend the law.

Solicitor General Douglas Bahr addressed the questions posed in your letter in his testimony before the legislative committees hearing these bills. Mr. Bahr's testimony was provided at the request of the committee chairs. This letter supplements and documents Mr. Bahr's testimony.

In addressing your questions, I note Justice Brennan's statement that the United States Supreme Court's "historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools." School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). With that statement in

mind, I will respond to your questions as concretely as possible based upon the current case law in this complex and evolving area of the law.

Engrossed Senate Bill 2177

Engrossed Senate Bill 2177 provides:

> An object or document containing the words of the Ten Commandments may be displayed in a public school classroom or public school building, or at any public school event, together with other documents of cultural, legal, or historical significance, which have influenced the legal and governmental systems of the United States and this state. The display of an object or document containing the words of the Ten Commandments must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects or documents.

Initially, I point out that any challenge to the posting of the Ten Commandments in a public school would likely be brought against a school district based upon a particular display. Any discussion regarding the constitutionality of SB 2177 assumes that the display complies with the requirements of the bill.

If SB 2177 is challenged directly, the challenger would be arguing the law is unconstitutional on its face, not that a school district's particular display is unconstitutional. The burden on one making a facial challenge to the constitutionality of a law is heavy. The United States Supreme Court has repeatedly explained that a facial challenge to a law is the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the law would be valid. National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1988); Reno v. Flores, 507 U.S. 292, 300 (1993); Rust v. Sullivan, 500 U.S. 173, 183 (1991); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514 (1990).

A number of courts have addressed whether the government's posting of the Ten Commandments is constitutional. In Stone v. Graham, 449 U.S. 39 (1980), the United States Supreme Court struck down a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public classroom. The Court found that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." Id. at 194. See also Ring v. Grand Forks Pub. Sch. Dist. No. 1, 483 F. Supp. 272 (D.N.D. 1980) (striking down North Dakota's Ten Commandments law

which required the display of a plaque containing the Ten Commandments in a conspicuous place in every classroom); cf. Washegesic v. Bloomingdale Pub. Sch., 813 F. Supp. 559 (W.D. Mich. 1993) (holding unconstitutional portrait of Jesus Christ outside of principal's office), aff'd, 33 F.3d 679 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); Joki v. Board of Educ. of the Schuylerville Cent. Sch. Dist., N.Y., 745 F. Supp. 823 (N.D.N.Y. 1990) (finding violative of First Amendment crucifixion mural outside of high school auditorium). Based upon Stone, Ring, and related cases, the posting of the Ten Commandments, by themselves, in a classroom or school would likely be found to violate the First Amendment.

However, neither Stone nor Ring went so far as to hold that the posting of the Ten Commandments in a school would always violate the constitution. In Stone the court noted:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function.

449 U.S. at 194 (citation omitted). Similarly, in Ring the court distinguished the challenged law from a case where the Ten Commandments were posted with other religious and non-religious symbols. 483 F. Supp. at 274. See also Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667, 677 (E.D. Ky. 2000) (finding school's display of the Ten Commandments unconstitutional, but noting the displays were not in an area with other memorials and were not incorporated as part of a larger, secular display).

Although not in the school context, one court noted: "Despite the undeniably religious nature of the Ten Commandments, federal courts have generally concluded that if there are countervailing secular passages or symbols in the content of the display or if the context of the display detracts from its religious message then the display may be constitutional." Colorado v. Freedom from Religion Found., 898 P.2d 1013, 1023 (Colo. 1995) (holding monument containing the Ten Commandments displayed among other larger and more conspicuous monuments and tributes on the grounds of the state capitol did not violate Establishment Clause), cert. denied, 516 U.S. 1111 (1996). See also Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973), cert. denied, 414 U.S. 879 (1973) (holding granite monolith on courthouse grounds that is inscribed with the Ten Commandments and other religious and non-religious symbols does not violate the First Amendment because the Ten Commandments are being presented for their historical significance); Suhre v. Haywood County, N.C., 55 F. Supp. 2d 384 (W.D.N.C. 1999) (finding granite frieze in a courthouse did not violate establishment clause because the sculpture recounted historical development of the law). For cases finding that an isolated display of the Ten

Commandments on government property violates the constitution, see Books v. City of Elkhart, Ind., 235 F.3d 292 (7th Cir. 2000) (finding display of monument inscribed with Ten Commandments on lawn of city's municipal building violated the establishment clause); Kimbley v. Lawrence County, Ind., 119 F. Supp. 2d 856 (S.D. Ind. 2000) (enjoining the placement of a monument containing the Ten Commandments on the Indiana Statehouse grounds); American Civil Liberties Union of Ky. v. McCreary County, Ky., 96 F. Supp. 2d 679 (E.D. Ky. 2000) (finding posting of Ten Commandments in courthouse violated First Amendment); Harvey v. Cobb County, Ga., 811 F. Supp. 669, 678 (N.D. Ga. 1993) (placement of Ten Commandments alone in an alcove of the courthouse, high on the wall, with no countervailing secular passages or symbols had effect of endorsing religion), aff'd, 15 F.3d 1097 (11th Cir. 1994), cert denied, 511 U.S. 1129 (1994).

A display of the Ten Commandments as permitted by SB 2177 may serve a secular purpose—recognition of a historical, jurisprudential cornerstone of the American and North Dakota legal systems. See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part); Books v. City of Elkhart, 235 F.3d at 302 (stating "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order"). Courts, however, look beyond the plain language of a statute to determine the actual purpose of the law or action. "[I]t is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38 (1985). For example, in Wallace the Supreme Court looked beyond the language of Alabama's statute providing for a period of silence in public schools and determined the statute's history revealed that the enactment had no secular purpose. See also Stone, 449 U.S. at 41 (finding Kentucky's law requiring the posting of the Ten Commandments unconstitutional despite the statute's "avowed" secular purpose).

In Stone, the Court specifically stated:

> If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

449 U.S. at 42. Although SB 2177 may have a secular purpose, if the testimony in support of House Bill 1128 emphasized the religious nature of the Ten Commandments and the need for our children to read and follow the principles embodied in the Ten Commandments, the bill's likelihood of surviving a constitutional challenge would be reduced.

The United States Supreme Court has explained that "[t]he context in which a symbol appears is critical because it may determine what viewers fairly understand to be the purpose of the display, and may negate any message of endorsement that the religious symbol might otherwise evoke." See Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929, 937 (D.N.J. 1993) (citing County of Allegheny, 492 U.S. at 573). SB 2177 provides that the display of the object or document containing the words of the Ten Commandments "must be in the same manner and appearance generally as other objects and documents displayed and may not be presented or displayed in any fashion that results in calling attention to the object or document apart from the other displayed objects or documents." When the Ten Commandments are displayed in this manner, courts are less likely to determine that an objective observer would believe the display is a governmental imprimatur to religion. Joining the Ten Commandments with other documents of cultural, legal, or historical significance detracts from the display's religious message. Such a display does not convey a message that the State approves or disapproves of any religious or non-religious choices or beliefs.

As noted, there are cases upholding the constitutionality of a display containing the Ten Commandments when the display contains other secular documents that serve a secular purpose and offset the religious message of the Ten Commandments. None of these cases, however, addresses the constitutionality of such a display in the school context. They involve courthouses and other public property. In school religion cases, the courts have applied a more stringent analysis because young minds are especially susceptible to influence and because students are captive audiences. Freedom from Religion Found., 898 P.2d at 1022-23. As noted in Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987):

> The [Supreme] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with private beliefs of the student and his or her family. Students are impressionable---and their attendance is involuntary.

(Citations omitted.) See also Lee v. Weisman, 505 U.S. 577, 592 (1992) (stating "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). Thus, what is constitutional on other government property or in other government buildings may not be constitutional in a public school.

Based upon the above analysis, I believe SB 2177 would survive a facial challenge. The lack of case law directly on point prevents me, however, from providing any assurance. Whether a particular display would survive a challenge requires a highly fact specific analysis that can only be approached on a case-by-case basis. Freedom from Religion Found., 898 P.2d at 1026. Whether a particular display containing the Ten Commandments is constitutional would depend on the nature of the display, including what secular documents are included in the display, the actual purpose of the display, and what a person would understand the purpose of the display to be based upon its contents and history.

You ask whether I have any proposed amendments to increase the likelihood SB 2177 will survive a constitutional challenge. One possible amendment is to add language prohibiting the display unless it is integrated into the school's curriculum. Another possible amendment would be to add language prohibiting the display unless the school district determines the primary purpose of the display is to serve a secular educational function.

I should point out that North Dakota law does not prohibit the display of the Ten Commandments in a public school or classroom. Any limitation on the display of the Ten Commandments in a public school is imposed by the First Amendment to the United States Constitution. Accordingly, passage of SB 2177 will not give school districts any more authority than they currently have. If posting the Ten Commandments as permitted by SB 2177 is constitutional, school districts can do that today whether or not SB 2177 is passed. If such a posting is not constitutional, SB 2177 will not change that fact.

Engrossed House Bill 1128

Engrossed House Bill 1128 provides:

> The board of a school district may authorize the display of cultural, legal, historical, and religious documents in a classroom or elsewhere in a public school. The display of religious documents, if authorized, may not be in a manner that calls attention to or otherwise promotes any particular document.

Based upon the above discussion, I have some concerns with HB 1128. First, unlike SB 2177, HB 1128 does not require that the religious documents be displayed together with the cultural, legal, and historical documents. It simply identifies types of documents that may be displayed in a classroom or elsewhere in a public school. Thus, religious documents, such as the Ten Commandments, could be displayed in one location while cultural, legal, or historical documents are displayed in another location. This would draw

undue attention to the religious nature of the Ten Commandments and is more likely to violate the First Amendment.

Furthermore, HB 1128 does not require or imply that the religious documents must be displayed for a secular educational purpose. This requirement is at least implied in SB 2177.

As with SB 2177, I believe HB 1128 would survive a facial challenge. Because HB 1128 grants greater discretion to school districts than SB 2177, I believe it is more likely that a display of religious documents under HB 1128 will be found unconstitutional. Again, the likelihood of a particular display surviving a challenge must be examined on a case-by-case basis.

Engrossed House Bill 1437

If adopted as engrossed, Engrossed House Bill 1437 would amend N.D.C.C. § 15.1-19-03 to provide:

> The board of a school district shall allow a classroom teacher to observe a period of silence for meditation, reflection, or prayer for up to one minute at the beginning of each schoolday. In addition, the school board may authorize the voluntary recitation of a prayer by a teacher or student and[1] the pledge of allegiance. The board or the teacher shall inform students that these exercises are not meant to influence an individual's religious beliefs, rather that the exercises allow students to learn about this country's freedoms, including the freedom of religion.

HB 1437 contains three significant parts. The first requires that a school district allow a classroom teacher to observe a period of silence for meditation, reflection, or prayer for up to one minute at the beginning of each schoolday. In Wallace v. Jaffree, 472 U.S. 38 (1985), the United States Supreme Court struck down an Alabama statute that required a daily period of silence in public schools for meditation or voluntary prayer. In doing so, the Court looked to the legislative history of the statute and determined that there was no secular purpose. The Court noted:

[1] Because a conjunctive "and" is used rather than a disjunctive "or," it appears HB 1437 requires the recitation of a prayer be accompanied by the Pledge of Allegiance. I recommend "and" be replaced with "or," and assume for purposes of this opinion that a teacher or student may recite a prayer, the Pledge of Allegiance, or both.

> The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of payer.

472 U.S. at 84. See also Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 (11th Cir. 1997) (upholding Georgia's Moment of Quiet Reflection in Schools Act).

Based upon Wallace and other case law, I believe it is likely that the first sentence of HB 1437 would be found constitutional. Its likelihood of success would be increased, however, if the specific reference to prayer in line 8 is removed. This in no way would prohibit students from praying during the period of silence. Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2281 (2000) ("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 schoolday"); Chandler v. Siegelman, 230 F.3d 1313, 1316-17 (11th Cir. 2000).

The second portion of HB 1437 permits a school board to authorize the voluntary recitation of a prayer by a teacher or student. In 1962, the United States Supreme Court held that New York's program of daily classroom prayer violated the Establishment Clause of the United States Constitution. Engel v. Vitale, 370 U.S. 421 (1962). Since that time, the Supreme Court and other courts have repeatedly found school sponsored prayer to be unconstitutional. See, e.g., Santa Fe Indep. Sch. Dist., 120 S. Ct. 2266 (2000) (holding policy of permitting student-led, student-initiated prayer before football games violates Establishment Clause); Lee v. Weisman, 505 U.S. 577 (1992) (holding that a requirement that a student stand and remain silent during giving of "nonsectarian" prayer at graduation ceremony violated Establishment Clause); School Dist. of Abington Township, Pa. V. Schempp, 374 U.S. 203 (1963) (holding unconstitutional a rule providing for opening exercises in public schools embracing reading of the Bible or recitation of the Lord's Prayer); American Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1995) (finding school board's policy of allowing vote of senior class to determine whether prayer would be included in the high school graduation ceremonies was unconstitutional); Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993) (finding school's practice of permitting coach of extracurricular basketball team to conduct prayers with team at practice and at end of games violated establishment clause); Altman v. Bedford Cent. Sch. Dist., 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (holding school district's promotion of Earth worship and prayer to the Earth offended the First Amendment); Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996) (finding

organized prayer time before lunch violated establishment clause); Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902 (N.D. Miss. 1995) (enjoining practice of allowing student group to broadcast morning prayer over intercom and allowing student-led prayers in individual classrooms during school hours).

In Lee, the Supreme Court explained:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), and School Dist. of Abington, supra, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

505 U.S. at 592 (citations omitted).

The prayers permitted by HB 1437 will take place on government property, under the government's control, where students are required to attend. In some cases the prayer would be offered by the teacher, a government employee. Even when the prayer is offered by a student, the school is effectively coercing students who do not wish to hear or participate in the prayer to do so. Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1488 (S.D. Miss. 1994) ("[i]f students are subjected to prayer in a 'captive audience' situation, the state, although not officially delivering the prayer, may be effectively coercing students who do not wish to hear or participate in a prayer to do so"), aff'd, 88 F.3d 274 (5th Cir. 1996). Students being able to excuse themselves from the prayer would not provide a defense to a claim of unconstitutionality. Schempp, 374 U.S. at 1573. For these reasons, it is very likely a court would find this portion of HB 1437 unconstitutional.

Although a school policy or practice which actively or surreptitiously encourages prayer is unconstitutional, I would like to emphasize that students may still voluntarily pray:

> The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. . . . 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 schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

Santa Fe Indep. Sch. Dist., 120 S. Ct. at 2281. See also Chandler, 230 F.3d at 1316-17.

The final portion of HB 1437 permits a school board to authorize the voluntary recitation of the Pledge of Allegiance by a teacher or student. The bill does not require that a student offer the Pledge of Allegiance or stand during the Pledge of Allegiance. Based upon current case law, it is my opinion that this portion of HB 1437 is likely to be found constitutional.

In 1943, the United States Supreme Court held that a student could not be forced to salute the American flag and give the Pledge of Allegiance contrary to the student's religious beliefs. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Since that time courts have repeatedly affirmed that students cannot be required to salute the flag, say the Pledge of Allegiance, or stand while the Pledge of Allegiance is said. Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978) (finding unconstitutional New Jersey statute requiring school students to show full respect to flag by standing while the Pledge of Allegiance is being given); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) (finding regulation requiring student who refuses to salute flag to either stand or leave classroom invalid); Banks v. Board of Pub. Instruction of Dade County, 314 F. Supp. 285 (S.D. Fla. 1970), aff'd 450 F.2d 1103 (5th Cir. 1971) (holding regulation requiring student to recite the Pledge of Allegiance to the flag or to stand quietly during the ceremony violates the First Amendment); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) (stating that it is blatantly unconstitutional for the state to compel any person to cite the Pledge of Allegiance to the flag), cert. denied, 508 U.S. 950 (1993); cf. Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963) (finding it violated students' First Amendment rights to suspend them for refusing to stand for singing of the National Anthem).

The above cases did not hold that saying the Pledge of Allegiance in school violated the Establishment Clause. Rather, they held that requiring a person to state the Pledge of Allegiance or show respect to the Pledge of Allegiance violated an individual's freedom of speech and freedom of religion. Courts have repeatedly held that schools may lead the Pledge of Allegiance daily as long as students are free not to participate. Sherman, 980 F.2d at 439; Smith v. Denny., 280 F. Supp. 651 (E.D. Cal. 1968). Courts have also held the phrase "under God" in the Pledge of Allegiance does not make the pledge a prayer, whose recitation in public school would violate the Establishment Clause of the First Amendment. Sherman, 980 F.2d at 445-48; Denny, 280 F. Supp. at 654; cf. Sheldon, 221 F. Supp. at 774 ("[T]he singing of the National Anthem is not a religious but a patriot

ceremony, intended to inspire devotion to and love of country. Any religious references are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation. The Star Spangled Banner may be freely sung in the public schools, without fear of having the ceremony characterized as an 'establishment of religion' which violates the First Amendment.").

It is my opinion that the portion of HB 1437 that permits the school board to authorize the voluntary recitation of the Pledge of Allegiance by a teacher or student will likely be upheld as constitutional if challenged.

Legal Defense of the Bills

You question how to best amend the bills so the cost of defending a lawsuit and any damages would be assumed by the State. The following language could be added to the bills to accomplish that purpose:

> The state, through the office of attorney general, shall furnish legal counsel to defend a school district, school board, school board member, or school employee in any action brought against the school district, school board, school board employee, or school employee to recover damages for any act taken under this section in good faith. Except for judgments for punitive damages, the state shall indemnify and save and hold harmless a school district, school board, school board member, or school employee for any final judgment for any act taken under this section in good faith. A school district, school board, school board member, or school employee may not be defended or indemnified by the state if the school district, school board, school board member, or school employee does not give written notice of the action to the attorney general within ten days after being served with a summons, complaint, or other legal pleading or if the school district, school board, school board member, or school employee does not provide complete disclosure and cooperation in defense of the action.

If any of the bills is challenged, rather than the particular action of local school officials or employees, the State is already responsible to defend the bill. Because the statute would be challenged on its face, meaning little if any discovery would be conducted, it is likely the costs of defending the lawsuit would not be substantial.

The cost of defending a lawsuit against local school officials and employees may be more fact based and include the additional costs of discovery. Furthermore, if the plaintiff prevails, in addition to paying any monetary judgment, the defendant would likely be required to pay attorney's fees and costs. Although normally each side must pay its own

attorney's fees in a lawsuit, a lawsuit challenging one of these bills would likely be brought under the federal civil rights act. Under the federal civil rights act the defendant would be required to pay all attorney's fees and costs to a prevailing party. Accordingly, if an amendment is added to any of the bills making the State responsible to defend and indemnify local school officials and employees for acts taken under the bill, a fiscal note should be attached to cover the costs of defending lawsuits and paying any judgments.

Although it is a legislative decision, I question the policy of requiring the State to defend and indemnify local school officials and employees for acts taken under the bills. HB 1128 and SB 2177 do not mandate that school officials and employees do anything. If local school officials or employees elect to display the Ten Commandments or any other religious documents, they do so based upon advice of their legal counsel and are responsible for their decision. This responsibility encourages well-reasoned and careful decisions about their course of action. The same analysis applies to the prayer and Pledge of Allegiance portions of HB 1437.

With regard to the period of silence portion of HB 1437, although the bill mandates school districts allow teachers to observe a period of silence, it does not require teachers to do so. Whether an individual teacher allows a period of silence is a decision of a non-state employee that the State should not have to defend or be financially responsible for.

I hope this letter assists in addressing the discussed bills.

Sincerely,

Wayne Stenehjem
Attorney General

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