

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 81-3

Date Issued: February 3, 1981

Requested by: Representative Gayle Reiten

--QUESTION PRESENTED--

Whether a law authorizing a school district to establish a period of silence not to exceed one minute for meditation or prayer at the commencement of the first class of each school day is constitutional.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a law which provides that a teacher may announce a period of silence not to exceed one minute for meditation or prayer at the commencement of the first class of each school day in all grades in the public schools does not violate the First Amendment of the United States Constitution or Section 4 of the Constitution of North Dakota.

--ANALYSIS--

The First Amendment to the United States Constitution provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .' United States Supreme Court decisions have made it clear that where the state prescribes the prayer to be said, even though the prayer is voluntary, there has been a violation of the 'establishment' clause. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schemp*, 374 U.S. 203 (1963).

The courts have prescribed a test against which to judge statutes alleged to violate the 'establishment' clause. The three part test is that the statute must have a secular purpose, that its primary effect must not be to enhance or inhibit religion, and that the statute or activity must not foster excessive government entanglement with religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Ring v. Grand Forks Public School District No. 1*, 483 F. Supp. 272 (D.C.N.D. 1980). This type of test was followed, for example, in *Florey v. Sioux Falls School District 49-5*, 619 F.2nd 1311 (8th Cir. 1980), which upheld a South Dakota school board's policy on Christmas observance and programs in the school.

A three judge federal district court in Massachusetts upheld a statute similar to the proposed law in *Gaines v. Anderson*, 421 F. Supp. 337 (D.C. Mass. 1976). The only difference in the statutes was that the Massachusetts law stated that the teachers 'shall' announce the period of silence whereas the proposed law uses the permissive 'may.' Considering the secular purpose of the statute, the Gaines court stated that the statute only

required the students to be silent. Silence was viewed as frequently necessary if schools were to achieve education goals and would tend to 'still the tumult of the playground and start a day of study.' The court stated that 'the legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of the teacher from a required moment of silence. These are legitimate secular ends and a purpose to advance them is constitutionally permissible.' 421 F. Supp. 337, 342.

The Gaines court also held that the Massachusetts statute was framed in the disjunctive and permitted either prayer or meditation without mandating one or the other. The students could use the minute of silence to think about secular matters as well as religious matters.

The Gaines case is an interesting decision in light of the law in question. While this case is not a pronouncement of the North Dakota Supreme Court, it is a source of useful authority.

However, in *Kent v. Commissioner of Education*, 402 N.E.2d 1340 (Mass. 1980), the Massachusetts Supreme Court overturned that state's voluntary prayer law. The Kent case is interesting because the new statute replaced the silent meditation or prayer statute which had previously been upheld in Gaines. Since the law in question uses the permissive 'may' it should withstand a constitutional challenge. The courts have simply not required absolute neutrality to the extent of prohibiting personal silent prayer.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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