Opinion No. 55-6108

February 17, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Jack L. Love, Assistant District Attorney, Fifth Judicial District, Roswell, New Mexico

Your request for an opinion, dated February 2, 1955, has been received. Since in the field concerned slight differences in factual situations may vary the result, I will set out the information on each situation as you relate it in your letter.

Firstly, in "one of the public schools in Roswell the students, with the permission of the principal, are conducting non-denominational, non-sectarian devotional meetings. Such meetings are held once each week, from 8:15 o'clock a.m. to 8:25 o'clock a.m., Wednesday mornings, in the Little Theatre of the high school. No literature is posted about the school, and no literature is left in or about the rooms. The buses ordinarily arrive from 7:50 o'clock a. m. until as late as 8:25 o'clock a. m., and there has been no change in such schedules. School takes up at 8:30 o'clock a.m. No teachers or school officials sponsor or supervise the meetings. The meetings are very general religious programs; some Bible reading is done. Each Tuesday morning, the principal of the school makes an announcement over the public address system, of the meeting to be held the next morning. No duress of any nature is used to secure the attendance of the students. In inclement weather, the students have shelter in parts of the school building other than the Little Theater."

Secondly; "is the having of religious invocations prior to the commencement of athletic events, such as ball games, and other school events, such as assemblies, held in school buildings or on school grounds, illegal?"

Your concern is whether or not the practices offend the Federal or State Constitution or our statutes. I think it only necessary to consider these practices in the light of the First Amendment to the Federal Constitution. This amendment is made applicable to the states by the Fourteenth Amendment to the Federal Constitution. Zellers v. Huff, 55 N.M. 519. The First Amendment to the Federal Constitution reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This office has ruled in a prior opinion that the use of school grounds or property after regular school hours for religious purposes or training was not prohibited by state law or the Federal or State Constitutions. Attorney General's Opinion No. 5075, dated September 9, 1947. That opinion is still deemed valid by this office.

However, I feel that in the first situation which you have presented there are features in the practice which taken together color the factual situation sufficiently to deny the application of the broad general rule stated in the above opinion.

The starting point in determining whether or not the practices offend may well be the general statement contained in Everson v. Board of Education, 330 U.S. 1:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State.'"

The practice in question is not strictly a "released time" program of the type which was considered in McCollum v. Board of Education, 333 U.S. 203, or in Zorach v. Clauson, 343 U.S. 306, but it is not so formally only because it precedes by a few minutes the beginning of set school hours.

Also arrayed with the argument that this practice is not a "released time" program such as was found objectionable in the McCollum case is the fact that here the religious exercises are, ostensibly, non-sectarian and non-denominational.

However, there are sufficient other factors present which warrant the examination of this practice against the background of the cases which considered "released time" programs.

As mentioned, ostensibly, the religious services or meetings are non-sectarian. I note, however, that you state that "some Bible reading is done." In this regard, attention is called to the case of Tudor v. Board of Education of Rutherford, 14 N.J. 31, where it was held that the different versions of the New Testament are sectarian books, the Catholic Church recognizing only the Duoay Version, the King James Version acceptable to Protestants, and both versions objectionable to the views and faith of Judaism. Contra, Evans v. Selma Union High School District of Fresno County et al, 222 P. 801.

The two U.S. Supreme Court cases, which considered "released time" programs, are the McCollum case, supra, and most recently, Zorach v. Clauson, supra. The crucial difference in the programs considered in the two cases was that in one the religious instruction was permitted upon school premises, while in the other the students were released to attend religious instruction in places other than school premises. In other respects the programs were similar. The time released was that which otherwise would

be school time. The choice of attending was left to the students. Those who preferred to refrain from attending stayed in school and those who chose to go were permitted to do so. In both, the teachers kept records as to presence or absence of students during released time.

The different results arrived at, prohibition of the program in the McCollum case and finding of no objection in the Zorach case, makes difficult the anchoring of a line of demarcation between those practices constitutionally objectionable on the one hand, and those constitutionally unobjectionable on the other. The difficulty is enhanced by the fact that the Justice writing the McCollum opinion as well as two others concurring in the majority of that opinion dissented in the Zorach case.

Thus, only the principle is clear, church and State must be kept separate. At what stage fusion becomes constitutionally objectionable depends upon the particular situation. A combination of factors in one situation may invoke the inhibition. A different combination may place the situation outside that inhibition.

Now the situation before us, the children come together at the public school grounds in the morning. True enough, formal school hours begin at 8:30 and until then no obligation rests upon a child to be in the class room. But children are children. The obligation to be in school at 8:30 may draw them there a little earlier. The attraction may be a chance to play or otherwise enjoy the companionship of fellow students. For those who may arrive on buses, being there early may not be a matter of choice. And arrival even forty minutes prior to school time, as you indicate happens in some instances, may be necessary if the child is to be in school at 8:30.

Justice Frankfurter suggests, in his concurring opinion in the McCollum case, that church leaders, in formulating "released time" programs, decided that a way must be found to give religious education to children during what children conceived to be their "business hours". I suggest that a child's "business hours" may include that short period of time prior to 8:30 a.m. when, by choice or of necessity, he may come upon the school grounds to be at hand when the bell summons him to instruction which the State orders he must have.

It is stated that "no duress of any nature is used to secure the attendance of the students". I assume that what is meant is that no one is directly asked or solicited to attend. The prohibition against duress or compulsion by the state may, however, work against more subtle compulsions than direct solicitations. Here, the students know that on Wednesday morning at 8:15 a.m., religious services will be held upon their public school grounds. Their principal has so announced on Tuesday morning. That he may know that there is no direct duty to attend may not be an answer.

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an

outstanding characteristic of children. The result is an obvious pressure upon children to attend." Justice Felix Frankfurter, concerning opinion, McCollum case at page 227.

We know that release of students during school hours to attend religious services or instruction held on school grounds is unconstitutional. Where the instruction or services are off the school ground, the practice is not objectionable. The situation in question, with varying factors, lies somewhere between the two factual situations considered in the McCollum and Zorach cases. It is felt that it is closer to the situation in the McCollum case.

Limited to the circumstances presented, it is the opinion of this office that the holding of religious services, as outlined in your letter, is constitutionally objectionable.

Concerning your second question, it is our opinion that such practices, if called to constitutional test, would be held not objectionable. The Supreme Court of the United States, in the Zorach case above, made the following comment which would seem to indicate that the practices would not be objectionable:

"Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths -- these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"

Strict logic fails and only the general language, dicta though it may be, in the opinions wherein other questions dealing with the same principles, more or less, must be resorted to. These impart the suggestion that the courts would not go so far as to hold such practices unconstitutional. Though the specific point was not there for decision, aid to this conclusion is given by the language in our landmark case, Zellers v. Huff, supra, wherein it was said:

"However, we take this occasion to say that while we oppose the teaching of sectarian religion or the giving of control of the state or any of its agencies to any sect or combination of sects, yet we know religion itself is so intermingled in the daily life of our people and in the administration of and in the affairs of state that no wall of absolute separation of religion and state can be maintained -- but few would want it."

It is thus the opinion of this office that the practices related in your second question above are not constitutionally objectionable nor do they offend against any of our statutory provisions.

I trust that this helps in answering your inquiry.

By Santiago E. Campos

Assistant Attorney General