Opinion No. 70-27

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BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. William Byron Darden Attorney for New Mexico State University P.O. Drawer 578 Las Cruces, New Mexico 88001

QUESTIONS

FACTS

A faculty member at New Mexico State University has presented a resolution to the Faculty Senate to ban prayer at any university functions.

QUESTIONS

May a state educational institution ban prayers at university functions?

CONCLUSION

No.

OPINION

*{*46}* **ANALYSIS**

The question assumes that the passage of the resolution presented to the Faculty Senate would become binding upon the university in some manner. Without elaboration, this office is of the opinion that the only actions binding upon the university are those actions of the Board of Regents of the *{*47}* educational institution. Compare Attorney General Opinion No. 69-104, issued September 5, 1969. We assume further that the advisory directive of the Faculty Senate, if it is passed, will be considered by the Board of Regents. Once the resolution is so considered by the Board of Regents, the university will confront the question of the authority to ban prayers at university functions. We feel, as will be developed below, that a state educational institution may not ban prayers at any function. Upon these basic assumptions, this office will examine the applicable provisions of the New Mexico Constitution and the Constitution of the United States, as well as federal cases interpreting the constitutional provisions.

Article XII, Section 11 (1969 P.S.), of the New Mexico Constitution provides that the various educational institutions of higher learning, that is to say, the colleges and universities operated throughout the state by state finances, are to be considered as state educational institutions. Article XII, Section 13 of the New Mexico Constitution directs the legislature to provide for the control and management of these state

educational institutions by a board of regents for each such institution. While these boards are responsible for the control and management of the various state educational institutions, nevertheless, these institutions shall forever remain under the exclusive control of the state. New Mexico Constitution, Article XII, Section 3. From these New Mexico constitutional provisions, it is apparent that the state educational institutions are instrumentalities of the state and that action by the institutions, through their boards of regents, necessarily is action by the state itself. Assuming that the board of regents of the state educational institution is presented with the question of whether it may ban prayer at university functions, the question ultimately becomes one of whether the State of New Mexico may, through the actions of the board of regents, ban prayer at university functions.

Article II, Section 1 of the New Mexico Constitution provides that the United States Constitution is the supreme law of the land. The First Amendment to the Constitution of the United States provides that Congress shall make no law respecting the establishment of any religion or prohibiting the free exercise of any religion. Article II, Section 11 of the New Mexico Constitution contains similar prohibitions and guarantees and provides, in effect, that there shall be given no preference by law to any religious denomination or particular mode of worship. The First Amendment to the United States Constitution, furthermore, has been held to apply through the Fourteenth Amendment to the United States Constitution, to the various states in the union. **Cantwell v. Connecticut,** 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

The First Amendment to the United States Constitution issues two commands to a government which becomes involved in religion. No government may establish any particular religion, nor may any government prohibit the free exercise of any particular religion. Although some individuals in this country believe this amendment requires a strict separation of church and state, the conclusion is inescapable that the two clauses were intended by the Framers of the Federal Constitution to operate together. The problem in this area, therefore, becomes one of balancing and reconciling these seemingly conflicting directives of the "no establishment" clause and the "free exercise" clause. The decisions discussed below hold that an effort to balance the "no establishment" and "free exercise" clauses confers upon the state the duty of neutrality, a duty which forbids the state either to advance or to inhibit any particular religion of form of worship.

The principal case of the United States Supreme Court on the question of reading prayers in public-supported schools is **Engel v. Vitale,** 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). In that case the New York State Board of Regents has composed a "non-sectarian" prayer and had recommended that it be read daily in New York public schools. The prayer read:

"Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

The Court held that the prayer *{*48}* amounted to an establishment of a particular religion, contrary to the "no establishment" clause, even though the prayer was denominationally neutral and its observance on the part of students was voluntary. Responding to the contentions that the practice should be upheld because participation was voluntary, the court declared at 370 U.S. 431 that the Constitution was violated whenever "the power, prestige and financial support of government is placed behind a particular religious belief."

The next dispositive United States Supreme Court decision was in the companion cases of **Abington School District v. Schempp and Murray v. Curlett,** 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). The latter of the two companion cases is important to the question under consideration since it involved no state statute, but only a practice of daily Bible reading and recitation of the Lord's Prayer which Baltimore school authorities had approved for the Baltimore public schools. In these companion cases the Court established a test for determining the constitutionality of the governmental action involved. In holding that these morning exercises were intended to advance the particular religion of Christianity, in opposition to the free exercise of all other religions, the court reiterated at 374 U.S. 225 that * * * "government maintain strict neutrality, neither aiding nor opposing religion." The court concluded at 374 U.S. 222 that governmental activity is unconstitutional if either its purpose or primary effect is the advancement or inhibition of religion.

Although the **Schempp** court used the word "enactment," the application of the decision extends to "activity" in the broadest sense. Such an interpretation is consistent with the context of that decision, particularly in light of the lack of any state statute in **Murray.** In addition, it should be stressed that the **Schempp** court appears to have treated the public school as a single entity and the case does not turn upon whether the state, or school officials, or teachers violate the constitution. Rather, it is the fact that the violation has occurred in the public-supported school, and thereby religiously influenced the students therein, that is crucial. The evils that the First Amendment intends to prohibit occur regardless of who is committing the violation.

There is no necessity of a "law" to find a violation of the First Amendment. This conclusion is supported by the concern of the courts in these cases with whether the overall effect has been to establish or inhibit religion, and not with the technical way in which the constitutional violation comes about. This interpretation is further supported by the observation of the U.S. Supreme Court in **West Virginia State Board of Education v. Barnette,** 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) at 319 U.S. 637 that:

"no official . . . can prescribe what shall be orthodox in . . . matters of opinion."

As to the question of who in the state educational institution would have the duty of strict neutrality, attention should be directed to the above interpretation of the **Schempp** decision, as well as to the analogy to the so-called "civil rights" cases, where the United

States Supreme Court has evolved the concept of "state action" for testing violations of the equal protection guarantees of the Fourteenth Amendment.

"If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." **Griffin v. Maryland,** 378 U.S. 130, 84 S. Ct. 1770, 12 L. Ed. 2d 754 (1964).

From these general rules, it is reasonable to conclude that churchstate rules apply as equally to official agencies of the state as they do to individuals acting under state authority. In the context of a ban of prayers at university functions, therefore, the duty of strict neutrality would apply not only to the Board of Regents of the institution, but to anyone else acting under the authority of the state.

With these principles in mind, it our opinion that a state educational institution *{*49}* may neither order nor ban prayers at university functions. To order prayers at such functions would amount to the advancement of a particular religion, contrary to the "no establishment" clause of the First Amendment. On the other hand, to ban such prayers would inhibit the free exercise of a particular religion, contrary to the "free exercise" clause of the First Amendment. In short, for a state educational institution to do either act would violate its constitutional duty of strict neutrality in this area of church-state relations.

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