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February 6, 1976

Honorable James B. Longley
Governor of Maine
State House
Augusta, Maine

Dear Governor Longley:

By letter of December 24, 1975, you asked what steps the State, through my office, could take to protect persons who choose to express themselves in prayer at the public schools and what approach could be taken "in restoring this basic right." You noted that you had pledged to support any legislative or constitutional effort to this end.

Although your letter does not specify the form you expect school prayers would take, I assume that you have in mind allowing the schools to set aside time expressly designated for prayer and perhaps to conduct organized prayer or other religious exercises. To that form of school prayer there is a settled federal constitutional objection that is not likely to be removed by any action within the practical reach of my office or any other branch of State Government.

The First Amendment to the United States Constitution prohibits enactment of any law "respecting an establishment of religion." The United States Supreme Court has repeatedly held that the Establishment Clause of the First Amendment is a restraint on the states and the Congress alike, and the Court has made clear that the Clause prohibits use of the public schools for any religious exercises sponsored by school authorities, whether compulsory or voluntary.

The restraints of the Establishment Clause cannot be avoided simply by attempting to insure that school religious observances are non-sectarian. In the so-called Regent's prayer case, even though student participation was voluntary, the Supreme Court barred public school recitation of a prayer, the language of which reflected a studies attempt at denominational neutrality.

Engel v. Vitale, 370 U.S. 421, 425 (1962). The Court's opinion observed, "It is no part of the business of government to compose official prayers." Released time for religious instruction has been disapproved when the instruction was to occur on school premises, Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948), and permitted when it was to be held elsewhere. Zorach v. Clauson, 343 U.S. 306 (1952).

And in School District of Abington Twp., Pa. v. Schemp, 374 U.S. 203, 222 (1963), the Court held that in-school Bible reading, without comment, as a required classroom activity from which individuals were excused on request, violated the Establishment Clause. The opinion observed,

> "to withstand the strictures of the establishment clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion."

An executive or legislative effort expressly aimed at returning to the public schools, whether as a "right" or an obligation, would be unlikely to pass this test.

Since the legal constraints prompting your inquiry, if I correctly understand it, stem from the Federal Constitution, only an amendment to that instrument would suffice to sanction any form of organized prayer in the public schools. As I recall, the most recent such amendment, proposed by the late Senator Dirksen of Illinois, failed to receive Congressional approval and was never submitted to the states. The alternative method of proposing a federal constitutional amendment requires that the legislatures of two-thirds of the states request the calling of a convention for that purpose.

The Supreme Court opinions to which I have referred deal with organized prayer, periods for prayer designated as such, and teacher participation. They do not, of course, prohibit or even address private prayer or meditation, undertaken on a pupil's own initiative and not disruptive of other school activities. If you intended your question to refer to nothing more than this, then the answer is that such a right has never been questioned. A student has as much right to pray or meditate silently in school as he has to reflect on any other subject.

Constitutional difficulties have ordinarily surfaced when students, parents, or the schools attempt something more than private prayer or meditation. Thus the Court of Appeals for the Second Circuit, in Stein v. Oshinsky, 348 F.2d 999 (2nd Cir., 1965), cert. denied, 382 U.S. 957, held that the public

schools may forbid prayers aloud in the classroom during regular classroom periods, and suggested that to do otherwise might be equivalent to sanctioned prayers in violation of the Establishment Clause. The Massachusetts Court struck down a school board resolution making classroom facilities available for group prayers, with voluntary teacher participation, for five minutes before the regular school day began. Commissioner of Education v. School Committee of Leyden, 267 N.E.2d 226 (Mass., 1971). On the other hand, the courts have not prohibited schools from observing an undesignated period of silence, during which any student's mind and heart may be occupied as he or she chooses, and it seems to be the opinion of the New Hampshire Court that a period of silent meditation would be permissible. Opinion of the Justices, 307 A.2d 558 (N.H., 1973). Whether such a period could be required by legislative enactment for the express purpose of allowing individual prayer is considerably more doubtful.

Because I recently received a very similar request for my opinion from Representative John L. Martin, I have taken the liberty of sending him a copy of the foregoing letter.

Very truly yours,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB/ec
cc: Honorable John L. Martin