FORMAL OPINION

November 24, 1969

HONORABLE CARL L. MARBURGER
Commissioner, Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION 1969 – NO. 3

Dear Commissioner Marburger:

You have asked whether a resolution of a local board of education providing for a period of "free exercise of religion" on school premises prior to the formal opening of each school day violates the First Amendment to the Constitution of the United States.

In responding to your inquiry in accordance with the duty imposed upon the Attorney General by N.J.S.A. 52:17A-4(e), we are mindful of our responsibility to respect and abide by the Constitution of this state and of the United States as interpreted by the courts. See *N.J. Const.,* 1947, *Art.* VII, *Sec.* I, *para.* 1; *Jackman v. Bodine,* 43 N.J. 453 (1964); *Sills v. Hawthorne Bd. of Ed.,* 84 N.J. Super. 63 (Ch. Div. 1963), *aff'd* 42 N.J. 351 (1964); see *Cooper v. Aaron,* 358 U.S. 1, 16-20 (1958); see also, Opinion of the Attorney General F.O. 1964, No. 1.

The attendant facts and circumstances giving rise to your inquiry are as follows: At a regular meeting of the Netcong Board of Education on September 2, 1969, the following resolution was passed:

> "That the Superintendent be instructed by the Board of Education to institute prayers in the Netcong Schools, forcing no student to pray if unwilling but denying no student the right to pray, details to be worked out by the Board of Education."

It was further resolved that:

> "Members of the clergy from the communities of Netcong and Stanhope be invited to meet with respresentatives of the Board of Education and compose a suitable prayer for the Board's consideration. In the interim, the Superintendent is instructed to institute 30 seconds of silent meditation until the Board takes further action."

On September 10, 1969, the Board rescinded its resolution of September 2, 1969 and enacted the following:

> "On each school day before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by the United States Constitution. This freedom of religion shall not be expressed in any way which will interfere with another's rights. Participation may be total or partial, regular or occasional, or not at all. Non-participation shall not be considered evidence of non-religion, nor shall participation be considered evidence of or recognizing an establishment of religion. The

> purpose of this motion is not to favor one religion over another nor to favor religion over non-religion but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility, to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

At a special meeting on September 16, 1969, the Board adopted the following supplementary resolution:

> "BE IT RESOLVED that the Superintendent of Schools be authorized, empowered and directed to implement the resolution creating a period for the free exercise of religion in whatever manner, in the exercise of his discretion, he considers best under the circumstances."

The Superintendent of School has implemented the resolution only at Netcong High School. The requirements of the resolution have been met in the following manner:

Normally all high school students must be in their homerooms at 8:05 a.m. with classes to begin at 8:10 a.m. (Most students walk to school except those from Stanhope, whose buses arrive at approximately 7:30 a.m.) Pupils may enter the school building whenever they arrive although in practice, weather permitting, most stay out of doors until either 7:55 or 8:05 a.m.

The religious exercise period is conducted on a voluntary basis at 7:55 a.m. in the high school gymnasium. The students who wish to join either sit or stand in the bleachers. A student volunteer reader then comes forward and reads from the Congressional Record, giving the date, volume, number and body (Senate or House of Representatives) whose proceedings are being read.[1] The reading contains the "remarks" of the Chaplain of the House or Senate.[2] The selection of the material to be read is made by the volunteer reader with the approval of the high school principal. Readers are assigned by the principal in the order in which they volunteer to participate. At the conclusion of the reading, the students are asked to meditate for a short period of time on the material that has been read.

Students who do not wish to participate in the program are free to enter the building and to go to their lockers or their homeroom during the exercise. They may also remain outdoors or off school grounds, or they may simply arrive at school after the program is concluded, which is generally around 8:00 a.m. No records are kept regarding participation in the program.

It is the opinion of this office that the resolutions of the Netcong School Board, and the implementation thereof, constitute an infringement of the First Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Everson v. Board of Education of Ewing Twp.,* 330 U.S. 1 (1947); *Sills v. Hawthorne Board of Education, supra.*

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The freedom of religion provision consists of two distinct but interrelated por-

tions, the Establishment Clause and the Free Exercise Clause. The interrelationship of these clauses was discussed by the Supreme Court in the decisions in *School District of Abington Twp. v. Schempp* (*Murray v. Curlett*), 374 U.S. 203 (1963) and *Engel v. Vitale*, 370 U.S. 421 (1962):

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel v. Vitale*, 370 U.S. at 430.

On the other hand, the Free Exercise Clause:

> ". . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington v. Schempp*, 374 U.S. at 223, 224.

In other words, the distinction between the two clauses is predicated upon the fact that the Free Exercise Clause necessarily involves coercion while the Establishment Clause need not.

In *Abington*, the Court struck down the statutory provisions of Maryland and Pennsylvania providing for Bible reading and the recitation of the Lord's Prayer. In so doing the Court held that the Establishment Clause clearly prohibits the states from instituting any form of prayer or worship for its citizens to follow, whether sectarian or nonsectarian, and whether participation therein is voluntary or required. Patently, what is proscribed by the Establishment Clause is not the use of any particular form of prayer, but rather any establishment by the state of a religious or devotional exercise in connection with the operation of the public school system. It was further recognized that the actual and potential compulsion upon those students who might not wish to participate but who might do so out of fear or embarrassment would contravene the Free Exercise Clause notwithstanding that they could be excused therefrom upon request.

In *Engel v. Vitale, supra*, the interaction between the clauses was more subtle. There, the State of New York adopted a voluntary daily program of denominationally neutral prayer in the public school classrooms. The Court invalidated the program on Establishment Clause grounds.

> "There can be no doubt that New York's state prayer program offically established the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'non-denominational' and the fact that the program, as modified and approved by the state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain

> silent or to be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment." 370 U.S. at 431.

A basic principle which has emerged from the pertinent cases is that the guarantees of the First Amendment concerning religion are observed best by "wholesome neutrality" on the part of the state toward matters sectarian. *School District of Abington Twp. v. Schempp, supra.* This is not to say that the state must be hostile toward religion, but rather steer a careful course between the constitutional prohibition against establishment on the one hand and the constitutional guarantee of free exercise on the other. See *Everson v. Board of Education, supra.* Thus, the *Everson* rationale, reiterated in *Abington,* is viable today:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education,* 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392, *supra; McGowan v. Maryland,* (366 U.S. at 442)." 374 U.S. at 224.

See also, *Board of Education v. Allen,* 392 U.S. 236 (1968); *Rhoades v. School Dist. of Abington Twp.* (*Worral v. Matters*), 424 Pa. 202, 226 A. 2d 53 (1967) *appeal dismissed* 389 U.S. 11 (1967).

On the basis of the foregoing discussion of the First Amendment as it has been interpreted by the courts, there are three issues presented by the action of the Netcong Board and its subsequent implementation: (1) whether reading the daily opening invocation from the Congressional Record at Netcong High School constitutes a religious observance; (2) whether the alleged voluntary nature of the observance removes the activity from the constitutional prohibitions of the First Amendment; and (3) whether the Netcong resolution satisfies the "primary" purpose test of *Everson.*

First, the materials read by the student volunteers in this case, although characterized as "remarks" of the Chaplain from the Congressional Record, clearly constitute a religious exercise within the meaning of *Abington* and *Engel.* The Congressional Record generally begins: "The Chaplain, the Reverend ....., offered the following *prayer*" (emphasis added). During the month of October 1969, the Congressional Record indicates that the various Chaplains quoted from Romans, Deuteronomy, Ephesians, Isaiah and, on seven separate occasions, from Psalms (see Appendix A). With respect to reading from the Bible, the trial court found in *Abington* that the reading of verses, even without comment, constitutes a religious exercise. In the present case, the biblical quotations are followed as well by the prayers of the individual ministers (see Appendix A). In this regard the Supreme Court in *Abington* (374 U.S. at 224) approved the finding of the trial court that:

"The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer." 201 F. Supp. at 819.

Further, the Congressional Record reflects that when the Bible is not quoted by a Chaplain, the "remarks" consist exclusively of a prayer. During the month of October 1969, for instance, every Chaplain commenced his invocation with the words "O God", "Eternal God", "Eternal Father" or the like, and ended with the word "Amen" (Appendix A). A glance at the Congressional Record establishes clearly that the Chaplains' "remarks" are indeed "solemn avowals of divine faith and supplication for the blessings of the almighty". *Engel v. Vitale,* 370 U.S. at 425.

In many instances the prayers in the Congressional Record are not nondenominational since "Christ" and "Jesus" are referred to therein (Appendix A). However, even if certain of the prayers can be said to be nondenominational, they would still fall within the proscription of *Engel v. Vitale, supra.* See also, *School District of Abington v. Schempp,* 374 U.S. at 216. As one respected scholar has noted:

"Nor should it be of consequence, that the prayer was 'nonsectarian'. Even such a prayer can be productive of religious divisiveness, not only because it is objectionable to non-believers or non-theistic religionists, but also because theistic believers may find it an offense to conscience to engage in prayer except in accordance with the tenets of their own releigion. Moreover, religionists can have little enthusiasm for an officially sanctioned nonsectarian expression of religious belief which at most reflects a vague and generalized religiosity. Any usefulness of a prayer practice in public schools as symbolic of the religious tradition in our national life, of the values of religion to our society, and of religious ideas shared in common, must be weighed against the peril that the official promotion of common-denominator religious practices, conspicuous by their vagueness and syncretistic character, will contribute to the furtherance and establishment of an official folk or culture religion which many competent observers regard as a serious threat to the vitality and distinctive witness of the historic faiths." Kauper, *Prayer, Public Schools and The Supreme Court,* 61 Mich. L. Rev. 1031, 1066 (1963).

The use of the Congressional Record as source material for religious readings cannot be employed to circumvent the Supreme Court's pronouncements banning school prayer. There is no rational distinction between prayer and Bible passages read from a prayerbook or Bible, and prayer and Bible passages read from the Congressional Record. It is the reading of the prayer and Bible passages that is proscribed, not the source books from which they are taken.

Second, the alleged voluntary nature of the observance is not a defense to a claim of unconstitutionality under the Establishment Clause. Both in *Abington* and *Engel* the religious observance was voluntary in the sense that every student had a right to be excused from participating with parental consent. In both cases the Supreme Court rejected this contention:

> "Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools.
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> Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel v. Vitale, supra* (370 U.S. at 430)." *School District of Abington Twp. v. Schempp,* 374 U.S. at 223, 225.

There can be no doubt that under *Abington,* the fact that Netcong holds its religious exercise ten minutes before the students must be in their homerooms does not avoid the constitutional impropriety. The real issue according to *Engel* and *Abington* is not whether the child is compelled to attend the service but whether the service exists with the official sanction of the school authorities. In Netcong, the service is held on school grounds and the principal approves the selection of the material and assigns the volunteer readers on a first come, first served basis. In other words, the school authorities participate in and place their imprimatur upon, this religious exercise, thereby contravening the provisions of the First Amendment. As the court noted in *Reed v. Van Hoven,* 237 F. Supp. 48 (E.D. Mich. 1965):

> "An examination of the establishment clause in light of the *Schempp* and *Engel* cases, *supra,* reveals that there need be no coercion upon minorities in order for a violation of the establishment clause to exist. It is only necessary that the practice or enactment have the net effect of placing the official support of the local or national government behind a particular denomination or belief. *Abington School District v. Schempp, supra,* 374 U.S. at 222. See also *Engel v. Vitale, supra,* 370 U.S. at 430-436, 82 A. Ct. 1261." 237 F. Supp. at 53.

Third, there is no question but that the design of the Netcong School Board resolution was to circumvent the Supreme Court's school prayer decisions and to aid religion generally. As such, it fails to satisfy the primary purpose test of *Everson,* which withdraws certain state action from the proscription of the First Amendment where its primary purpose can be shown to be "child benefit" rather than a desire to aid religion. See also, *Board of Education v. Allen, supra.* It has been suggested that exercises such as those in question are primarily for the benefit of the children since they presumably instill nonreligious moral values. This suggestion was rejected by the court in *Abington* (374 U.S. at 224), which indicated that if the inculcation of nonreligious moral values was truly involved, the exercises would not be voluntary.

On the basis of the foregoing it is clear that the readings at Netcong High School constitute a religious exercise; that the "voluntary" nature of the observance cannot

affect the fact that such a religious exercise is repugnant to the First Amendment and that the primary purpose of the exercise is not "child benefit". Accordingly, we conclude that the Netcong resolution and the exercises implementing it are unconstitutional.

Very truly yours,
ARTHUR J. SILLS
Attorney General of New Jersey
By: VIRGINIA LONG ANNICH
Deputy Attorney General

1. We have so been informed by the Superintendent of Schools of Netcong.
2. See Appendix A which contains, chronologically, twenty-three opening "remarks" by Chaplains from the Congressional Record for the month of October 1969. Although we have not been able to ascertain which volumes of the Congressional Record have been read by the student volunteers thus far, this appendix was compiled as an example of the type of material from which the readings are taken.

October 6, 1970

HONORABLE PAUL T. SHERWIN
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION 1970—NO. 1

Dear Secretary Sherwin:

You have requested our opinion as to when the terms of office of the various state officers appointed pursuant to the New Jersey Constitution begin to run. It is our conclusion that the terms of office of these officers begin as of the date of the commission issued by the Governor and that the issuance of a commission rests within the sole discretion of the Governor.

The New Jersey Constitution expressly states that terms of office commence as of the date of the commission:

> "The term of office of all officers elected or appointed pursuant to the provisions of this Constitution, except as herein otherwise provided, shall commence on the day of the date of their respective commissions; but no commission for any office shall bear date prior to the expiration of the term of the incumbent to said office." Art. VII, § 1, par. 5.

While this paragraph provides that the date of a commission may not antedate the expiration of the term of the incumbent, it does not otherwise specify what date a commission shall bear. To answer this question, therefore, it is necessary to consider